Things Real. By Mr. Gould.

Things, as that word is used in the Law, are the subjects of property; or the subjects in which an interest or Estate, can be enjoyed.

Things are divided into two classes, Real and Personal — things that are always either Real or Personal.

Things Real are such as are permanent, fixed & immoveable, as Lands or Tenements. And all other things or subjects of property, are personal in their nature, as money, goods &c. Chattels savoring of the nature. 2 Bl. C. 16. 386. 7. 1 Inst. 118. 2 Woodd. 4.

Things real, are said to consist of Lands, tenem.ts & hereditam.ts The term Land, includes in the Law, all things of a permanent & substantial nature.

Tenement, is somewhat of a greater extent; — In its legal sense, it denotes every thing of a permanent nature, corporeal or incorporeal. Land is always corporeal, & tenement includes Land, & therefore it is of greater extent, — not only Lands &c, but incorporeal rights, as rents &c are tenements; but these latter never fall under the denomination of Land. 1 Inst. 6. 19. 20. 2 Bl. C. 17.

The word Hereditament, is still more general in its significa tion; for it includes not only land & tenement, but also whatever may be inherited, even tho the thing inheritable is not, in its original nature Real — neither land nor tenement. The word Hereditament then includes all things, whether real or personal, whether corpore al or incorporeal, or mixed, which may be inherited. Honor an Heir loom is a hereditament. It is not land, because it is not permanent; It is a personal chattel, which by custom is descendible; therefore it is an hereditam.t tho neither land nor tenem.t 3 Co. 2. 2 Bl. C. 17.

Of these words, viz. Lands, Tenements & Hereditaments, are descriptive of the Subject, in which an interest may be had; but not of the quantity of Estate which may be enjoyed. Thus if a Conveyance

&c.

to B. under the name of Hereditament. it does not follow of course that a freehold estate is conveyed.

Hereditaments then are of two kinds Corporeal & Incorporeal. A Corporeal Hereditament consists of some substantial & permanent object; all these may however be included under the term Land; for the word Land, used in the Law comprehends not only any ground, soil or earth, but also waters & buildings upon it. It also extends it. 1 Inst. 4. 2 Bl. C. 7. 8. 18.

An action will never lie to recover a Book or Stream of water as nominate - but where one wishes to recover the use of water he must sue for the land covered with water, because in water one can have but a transient usufructuary property. Idem.

Land also in its legal signification, has an indefinite extent upwards & downwards. Hence if A builds a House so as to overhang B's land, B may have an action for the nuisance tho it does not touch his land at all. Idem.

And for the same reason a conveyance of land conveys all the minerals & fossils contained in it, as well as the wood & water upon it. Idem

These particular subjects however viz, wood buildings, minerals &c may be conveyed by their own proper name. E.g. A may convey his house & not pass the land on which it stands. But this can't be done as to water; the grantee in a conveyance of water will receive only a right of fishing. The reason is that the property in water is transient & continually changing. 1 Inst. 4. 5. 6. 2 Bl. C. 8. 19.

An Incorporeal hereditament is a right issuing out of, annexed to, or concerning, or exercisable within a thing corporate. Thus if A has a right of common on the land of B. it is an incorporeal hereditament for tho the soil belongs to B. he does not own the land - So if A has a right of way, rent &c. these issue out of a thing corporate. 2 Bl. C. 20. 1. 1 Inst. 19. 20.

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For the different kinds of Incorp^{l} Hereditt. &c. 2 Bl. C. 21. &c.

I have a remark to make as to one or two of these Incorp^{l} hereditt. only.

As to the right of Common. This is a right which one has to a profit in or upon the Land of another - Thus if A. has a right to depasture his Beasts upon the Land of B. he has a right of Common - but he has no interest in the Lands at all. So if he has a right to fish in another's Pool or Pond - it is a right of Common, tho he has no interest in the Land - This is called Common of Piscary. 2 Bl. C. 32.

As to common of Piscary, the rule in case of a navigable river, from not navigable is different. The rule as to a navigable river (arms of the Sea is, that the right of Soil or bed of the river is prima facie in the King or in the State. But y^{e} right of fishing is common to all the Subjects. In a river not navigable the right of Soil or bed of the river & the fishing is exclusively in the adjoining proprietors. If then two persons are bounded by a river not navigable, the right of each extends to the centre of the river - 4. Burr. 2164. Doug. 425. 2 Roll. 170. 1 Mod. 105. 6 H. 7. 3. Salk. 357. 4 T. R. 437. 2 Bos. & Pul. 472.

I observed in case of navigable rivers (arms of the Sea, that the Soil was in the King or State. But this right of Soil or fishing may be granted to an individual - You perceive then it is not necessarily in the King &c but may be a subject of grant to an individual. 5 Co. 107. Dy. 326. Hargraves Tracts 12. Hale de jure maris 26. 27. 2 Bos & Pul. 472.

The same distinctions as govern in case of navigable rivers apply to the Sea Shore, as between high & low water mark - that is, the right of Soil as between these two marks is prima facie in the King - The right of fishing is in the Subjects but may both be granted to individuals. 2 Bos & Pul. 472. 5 Co. 107. This point settled in our Ct of Errors, in the case of Cook v. Lockwood - Dayt R.

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But when a grant of Land is made to an individual, bounded by the Sea, it extends to low water mark. The rule is the same as to a navigable River, or arm of the Sea. The consequence is, that the King grants a tract of Land bounded by the Sea, it extends to low water mark. but the exclusive right of fishing is still common to the subjects - and the right extends also to shell fish, the Land between high & low water mark may be dug for that purpose.

Of Estates in Lands Tenements & Hereditaments.

An Estate in Lands &c is the interest which the Tenant has in them. Thus if one conveys all his Estate in the Lands of A. & B. & his heirs, he parts with all the interest he has in that Land. Bacon. 1 Inst 345. 2 Bl. C. 103. 1 T.R. 41 or 411.

The word Estate however, is sometimes used to express the subject, in which there is an interest, tho originally it expressed only the interest itself. Thus if A conveys all his Estate to B. for his natural life, it is plain his object is not to convey his whole interest, for he has himself a fee in the Land; & he does not convey any thing more than a Life Estate to the Grantee. The word Estate here means the same as Land. 1 Ver 228. 2 T.R. 654. 1 H.B. 413. 2 Ch. Ca. 335. 3 Wils 4. 14.

The quantity of interest which a Tenant has in Lands, tenements &c is measured by the duration of that interest - and hence it is, that the primary division of Estates is into Freehold & Less than Freehold. This division is founded on the duration, & the local extent of the subject does not determine the quantity of interest - thus a fee an Estate a fee of a quarter of an acre of Land is a greater Estate, than a Life Estate of an infinite number of acres. 2 Bl. C. 103. 4.

A Freehold Estate is one, to the conveyance of which, livery of seisin is necessary at Com. Law; except in case where the interest is incorporeal. Incorporeal hereditaments cannot be transferred by livery of seisin, for corporeal possession cannot be given of an incor-

incorporeal subject. But the rule holds with regard to corporeal hereditaments. This is the true & only criterion, which settles the Question whether an Estate is a freehold or not; if livery of seisin is necessary, it is a freehold, otherwise it is not. Litt. tit. §59. 2 Bl. C. 104.

Estates of freehold again, are either Estates of Inheritance or not of Inheritance. The former are again divided into Inheritances absolute & limited.

I am first then to treat,

Of Freehold Estates of Inheritance.

These Estates are either absolute or limited. An absolute Estate of Inheritance is an Estate which one holds to himself & his heirs generally, & absolutely, & without restriction to any particular heirs. Litt. §1.—

And here it may be proper to mention, that the word fee, has the same meaning in Law as the word feud or fief, & is contradistinguished from allodium. The latter signifies an Estate, which a person holds of his own right & of no superior - one over which he has the absolute dominion. On the other hand a fee simple is an Estate holden of some superior, in whom the ultimate property resides - In Engd. then & in all feudal Countries, the Lands are all holden mediately or immediately of the King - There is no such thing as an allodial Estate in England. The highest Estate a subject can have is a fee simple, & this is nothing more than a feud. In Conn. it has been declared by Stat. 7th June, Lands are holden to one & his heirs, it is allodial - the consequence is there cannot in Conn. be such a thing as an Escheat in case of an Extinction of heirs, unless it be by positive Law - But in Eng. Escheats are common. Stat. C. L. 34, §. 8.

The words fee however is now seldom used in its original sense but is ordinarily used to denote the continuance or quantity of Estate one has in Lands &c. 2 Bl. 106.

This word then in its present acceptation is used to denote an Estate of inheritance - and when used without any adjunct or with the word

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"Simple", it is used in contradistinction to fee conditional, or feetail.

The word fee then is used to denote a fee simple, that is an absolute or unconditional one.

If a limited fee is intended — words expressive of the limitation must be used. 2 Bl. 106.

The fee simple generally resides in some person, or in other words it cannot in general be in abeyance or in expectation.

Indeed it is a general maxim of the C. L. that the fee cannot be in abeyance, Consistently with this rule there may be several inferior estates carved out of the fee simple estate, and the holders of the several carved estates, and the owner of the land will hold his rights.

Thus if a man leases for life or years the fee simple continues in the lessor — and having never been divested the inheritance is in him — It is not to become his in future but is now his. 2 Bl. 107.

Justice Blackstone says tho' not correctly that if a grant is made to A. for life, and remainder to the heirs of B. the fee is in abeyance till the death of B. for till his death he has no heirs.

But it has been abundantly settled since, that in such case if an estate is limited with a contingent remainder over in fee, the fee continues in the grantor, till the contingency happens, and then it will vest in the remainder-man.

Suppose then an estate is given to A. for life with remainder over to an unborn son of B. in fee [illegible] till this son is born the fee remains in the grantor till the contingency happens and if the grantor dies, the fee will descend to the grantor's heir subject to be divested, [illegible]

happening of the contingency, that is the birth of the Child.
2 Bl 127. Carth 207. Hearne 275. 285. 6. 267. 513. Hard. 466 in Hearne.

Here is indeed an question upon this subject which does not appear to be well settled. It is admitted a freehold and of inheritance can be in abeyance. Littleton, and Bl. say that if a freehold be given to a corporation, it is always in abeyance; for the succession is not true till the death of the predecessor.*

It is a speculative case, and not important, which way it is decided. If it is in abeyance it is an anomaly in the law, and I suspect this is not the correct doctrine.
Litt. sect. § 646. 2 Bl. 107.

(* But as he, who succeeds acquires all the intermediate rights and can recover all the rents & profits which have accrued since the death of the predecessor, it would seem that the fee vests in him at the moment of the predecessor's death: If so, it certainly cannot be in abeyance.)

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With regard to the mode of creating or passing a fee simple, certain positive rules are to be observed - partly of feudal origin.

To pass a fee simple or any other inheritance by grant, the word "heirs" is indispensable. And the intention to pass the fee by grant, without this word, cannot be inferred.

This rule you see is a positive one, for however clear the intention might appear to be upon the words used, yet the Law will not infer that intention, without the word "heirs". If then a man says, "I give, grant &c. to A." he only takes an estate for life. or if he says to "A forever", or to "A and his assigns forever", or to A in fee simple, nothing more than a life estate will be created.

The usual operative words are to "A and to heirs forever". yet the word forever or any other word of perpetuity is unnecessary. Litt. Sect § 1. 2 Bl. 56. 107.

And here it is very important to be observed, that when "heirs" is thus used in a grant, it is a word of limitation, and not a word of description or purchase. By this is meant that the word "heirs" is not descriptio personarum, but a description of the quantity of estate which the original grantee takes — thus if land is conveyed to "A and his heirs", the word "heirs" does not describe the person who is to take after A. It is description of the quantity of estate A himself takes.

For you will perceive, if it were a word of description or purchase, the heirs would be considered purchasers, and they would be remainder men, and A hold only for life — by the way the words description and purchase are of the same meaning.

The construction of the words then that they become effective and give an inheritable interest in the first taker.

The words heirs being thus used, then an inheritance by grant, can't pass without "heirs", [illegible] as to devises and as to these a more liberal construction prevails

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ion if the intention appear an inheritance, it may be inferred from other words in the devises or wills
Comyn. 632. 2 Bl. 108.

In many other cases it will be found that a man in his manner of construction is more adapted as to devises than as to deeds. One reason is, that devises are of later origin, when a more liberal method of thinking prevailed.

Besides, the rules as to the construction of deeds were adopted, in general times, and it is not in the power of Courts to alter them.

Thus if one devises land to A "in fee simple" A. will take a fee simple, for it is manifest that a fee simple was intended to be passed. The a deed, only a life estate would pass.

Again, "I devise my lands to A forever". or to "A and his assigns forever" A takes a fee simple. the intention is manifest. A fee simple is the only estate, which can last "forever". the intention would be defeated unless he takes a fee simple. Doug. 322. 2 Bl. 381. 1 Bl. R. 672. 4 Burr. 2377. 2 Bl. 606. Hearne 115.

But if one devises lands to A. and his assigns without words of perpetuity, a fee will not pass, because an intention to pass it is not manifest. So one having a fee simple, devises in this form, "I give, bequeath, and devise all my estate to A." without any word of inheritance or perpetuity, A. will take a fee simple. and as I observed before the word estate primâ facie, denotes the interest or right, which the party using it has. Talk 231. Comyn. 632. 1 Ld. R. 412. 2 Vk. 657. 1 Vk. 93. 5 Vk. 562. 6 Vk. 109. 607. 502. 1 Vk Bl. 223. 2 Vk. 1141.

Some opinions have been a distinction in favour

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between the words "all my estate" and "all my estate lying in N." was this, that in the former case, it is descriptive of an interest, yet in the latter case, on account of the words of locality, it was contended they were merely descriptive of the subject. According to late opinions this distinction is now exploded, and that a fee will pass in both cases. 2 Atk. 37. 1 Ves. 224. Cowp. 355. 2 P. Wms 524. 2 Ves. 614. 1 T. R. 411. Cowper 306.

There is however one particular case in which the question of construction does not appear settled, as if a devise is made in this form, "all my estate in the occupation of J. S." Here I think nothing more than a life estate will pass for in no propriety of speech, can it be said that J. S. occupied the fee of the land, tho' he does the land itself. 1 Vezey 22[illegible]. 227.

Again. By the words, "all my effects, real and personal" when used in a devise, a fee will pass, in the real property. Cowp. 299. 1 East 53. 3 East 516. 2 New R. 343.

So also a fee has been holden to pass under these words. "all I am worth" used in a devise. These cases perhaps are exceptions to the rules of construction in case of deeds, and apply to devises only. 1 Bu. Chy. 437. 8 T. R. 66.

But the word "hereditament" does not per se convey an inheritance, as it describes merely the subject in which the person has the interests, and not the interest itself. To convey a fee some other words must be used. [illegible] 554. Hence if one devises "all my hereditaments to J. S." he will take only a life estate. 6 T. R. 175. 4 Mass. 477. 1 B. & P. 558. 3 T. R. 356.

But a devise in these words "I give to J. S. all my property" will prima facie carry a fee; for the word property is considered a description of the quantity and of the subject.

subject. 2. Saw. R. 2212.

And the word "legacy" has been holden to signify a devise of a real-estate, and will pass the fee, if the intention is manifest. 1. P. Wms. 182. 6 Cong. 39. 1. Burr. 24 b. 5. T. R. 116. 1 East. 57.

The examples last given, all are exceptions to the general C. L. rules of construction. There ~~for~~ is always more liberality of construction in wills than in deeds, for it is supposed to be made when the person was inops consilii, and in these cases a life estate only would pass, if such words were used in a deed, land even in will. if the words were. "I give "all my land" to A. it will pass only a life estate; for the word land, like the word "hereditament" above, is descriptive of the subject and not of the interest.

If however one devises his "land" to another, "the devisee paying a great sum" as debts Legacies &c the devisee will carry a fee, not by reason of any thing operative in the word "land". But on account of the condition, "paying a great sum" &c for otherwise the devisee might be a loser by accepting the devise, for he may die in poverty, and be subject to pay the debts. In such a case the devisee will be a loser, and the law is always presuming a benefit to the devisee. Therefore the Law will construe this to be a devise in fee. 6. Co. 16. 2 N. R. 343. Pow. on Dev. 502. &c 3. Burr. 1623. 3. T. R. 559. 1. Bos. & P. 30.

You will observe that the fee does not pass on account of any thing operative in the word "land" but on account of the condition annexed: and therefore, if one devises thus. "all my lands" to A. and paying such a sum out of the profits of it, only a life estate passes. For there are no words of perpetuity, no in-

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-nitable words, nor any condition by which the devisee can be a loser. He is not bound to pay any more than the amount of the profits. Until there was no reason why the general rule, should not have its operation. 1 Co. 16. Cowper. 2 37. 2 Atk. Ch. 345. 4 East 91.

A devise of land, of a given annual value, & passes and the devisee being required to pay an annual sum. amounting to less than the annual value, it passes only an estate for life. And yet you recollect in a former case, when it was to pay a gross sum, an inheritance passes. In the one case he is a loser, in the other he cannot be. 1 Co. 16 5 T. R. 13. 3 Bur. 1533. 1618. 1623. 2 Bl. R. 331.

For determining, the intention of the Testator as to the quantity of interest, resort is often had to the general introductory words. It is usual to begin a devise thus. "as to all my worldly estate" &c But these general introductory words will never alone have the effect to pass a fee, unless there is something in the body of the will, which evinces that intention also. These may assist in the construction, where other words are ambiguous. 5 T. R. 13. 14. 16. 3. Bur. 1625. Cowp. 299. 306. 660. 2 Peere 344. 7 T. R. 67.

The circumstances of a will's being attested, as a will to pass real estate must be, is not of itself sufficient to shew the intention was to pass a fee; for out of abundant caution these witnesses are often put to a devise of personalty property. Yet it is one circumstance which with others, may be considered in 1 T. R. 116. 2 Bl. 791. 4 East 91.

Thus far as to the relaxation of the rule of construction, in case of devises. There are some other exceptions to the general rule of C. L. that the word "heirs" is indispensable to create a fee simple. Thus the word "heirs" is not necessary to pass a

fee

is in a fine or common recovery. For these pass a fee by operation of Law. - it is a judicial conveyance 2. Bl. 108. 354. 357.

So also in grants of land to a sole Corporation, the word is not necessary to pass a fee; nay it is not proper — the word successor should be used and is indispensible.

And in a grant to a corporation aggregate, neither the word heirs nor successors is necessary to pass a fee — for if the grant is construed to be made only to the Corporation during life, it will last forever, for an aggregate Corporation never dies. It is usual however to insert the word successors tho not necessary. 1 Bl. 6. 4 Bl. — 2 Bl. 109.

And upon the same principle it is not necessary, in England to use the words heirs &c in a grant to the King, for he never dies, in contemplation of Law. Ibidem.

I observed before, that the word "heirs" is a word of limitation, and not of description or purchase, that is, it is a word expressive of the quantity of interest, and not of the persons, who are to take. Thus if A. holds to himself and his heirs, he may sell the estate. He has the dominion over it - and may disinherit the "heirs". Again, suppose an estate is limited to A. for life, with the remainder to his heirs — yet A. takes a fee simple, and his heirs could take only thro him by inheritance.

Again — Suppose an Estate is given to A. for life — remainder to B. for life, then the limitation to the heirs of A. — now A. will take a fee simple at first, subject only to the limitation of B. He then has a fee simple, which will open to let in B's remainder, and on his death A's heirs will take it as such and not as purchasers. Fearn. 1 to 31. 42 to 46. 79 to 82. 90 to 92. 101. to 107. 112. to 125. 294. 1 Co. 98. 104. 5. 11 Co. 77.b

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...Case in both cases I have given the remainder, vests immediately in the ancestor by its vesting is meant, that it vests in interest. In the former case, it vests in possession at the creation of the estate. But in the latter case it does not vest in possession till the intermediate remainder of B. is closed.

The same rule applies mutatis mutandis to the case of an estate tail. If an estate is given to A. for life, and remainder to the heirs of his body — A takes an estate tail in the first instance, as in the above example he took a fee. And to give an example of the second kind, if an estate is given to A. for life, remainder to B. for life, and remainder to the heirs of the body of A. — A takes a fee tail, as in the above case, he took a fee subject to the intermediate remainder of B. Vide.

I have no doubt these cases will appear arbitrary — it might be considered so, if the word heirs was considered a word of purchase, but however it is not. there is another reason, if the word heirs was not used as a word of limitation. I do not know what word could be made use of, as an operative word to fix the fee. If the word was to be considered, as a word of description, or purchase, the heirs would take an estate for life in remainder-men, because no words of perpetuity are inserted: for you can't use the word "heirs" in both cases i.e. as words of perpetuity & of purchase too. You must use it, one sense or the other and that exclusively. If you construe it as a word of description, you would give effect to the particular intent, which is contradictory to the general intent. And when these are contradictory, you are to give the general intent, an effect rather than the particular intent. The reasons then are two, that if the

the word "heirs" is a word of limitation, and the 2nd
if it was used as a word of purchase, the particular, and not
the general intent would be enforced. There is said to be an-
other reason, which in feudal times had effect. tho' now it has
ceased - it was, that when heirs took as heirs they paid a fine
to the Land. This is now done away.

Heirs being regularly a word of limitation, a devise
to the heirs of A. conveys no estate, unless A. dies before
the testator, the devise lapses. nemo est haeres - viventis -
2 Vent. 313. 1 Ves. 232. Comp. 313. 314. 8 T.R. 61 *

In laying down the divisions, I said freeholds were di-
vided into freeholds of inheritance, and freeholds not of in-
heritance. And that freeholds of inheritance were divided
into absolute and limited. I have treated of abso-
lute fees - Limited fees, are such estates of inheritance,
as are clogged with conditions, and these at C. L. are of
two kinds. 1st qualified or base fees, and 2nd fees condi-
tional, which latter are always called fees conditional at
C. L. The reason why so called is, that since the Statute
de donis, these fees have been converted into fees tail 2 Bl. 109.

A base fee is one which has a qualification annexed, an
act which must determine, when the qualification is at an end.
as in the common example of a grant to A. and his heirs, tenants
of the manor of Dale. This continuing tenants is a condi-
tion of their estate. and when they cease to be tenants their
estate determines. 1 Prest 29. 2 Bl 109.

A fee conditional at C. L. is one restrained to some
particular heirs of the grantee, as to the "heirs of his body"
or "the heirs male" or "female" &c. It differs then from a fee
simple in this, that a fee simple is a fee to a man and his
heirs generally, whether lineal, or collateral, and the fee
tail

* If however from any other words in the instrument it appears that the word heirs was used not, as a word of limitation, but as a word of descrip-
tion or purchase, the heirs apparent may take, and take as purchasers.
Thus if I devise to the heirs of A. now living, it is manifest I mean
the heirs apparent - and that I know them were not his heirs in the
technical meaning of the word, and therefore his heirs apparent
will take, though I die before A. Ley. 230. 2 Vent. 313. 1 P. W. 229.
1 Fond. 421. 2 Bl. R. 1010. 2 Bur. 1100.

An Estate given to one "& his his heirs" cant be qualified or
abridged of any of its legal incidents - Therefore a devise to one
and his heirs "provided it shall not be descendible," this proviso is
void, or "provided he will not devise", or "alien it" these are void,
for it is repugnant to the nature of the Estate. 1 Inst. 13. Doug.
329. 8 T.R. 61.

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tail to some particular heirs - as to his heirs male &c.

A fee thus limited is called a fee conditional - because there is an implied condition that it shall be void & die without such issue, it reverts to the donor, by virtue of this implied condition - this species of fee is also fee conditional.

If the estate of a man's proper heirs, is not a vested estate; that is, if a man dies intestate, it is not the estate reverts to the donor. Nov. Syl. 2 Bl. 109.

In case of a fee conditional however, if the grantee had such issue, as was described in the grant, the condition was considered as performed, and the estate absolute from the birth of that issue or three months. The birth of such however, does not make the estate absolute as to all purposes but to these it does. 1st to enable the grantee to alienate, 2nd to subject the land to forfeiture for his crimes, and 3rd to empower the grantee to encumber the land, so as to bind his issue. 1 Inst. 19. 2 Bl. 233. 4. 2 Co. C. 111.

But on the other hand, tho' the grantee had issue, yet if he did not alien the land and the issue died before him, &c. land or not died, reverts to the donor — for here as he has not claimed during the life of the issue and so can't afterwards. The issue having failed during his life he dies without lineal issue, and therefore the land reverts to the donor.

It is to be observed however that if in such case he left issue the estate becomes absolute for in the issue. 2 Bl. 110.

For a consequence of the construction of the right, to wit that in the birth of issue the grantee could claim the Statute of Westminster 2nd for tho' in 13 Edw. 1st and subsequent Statute "de donis conditionalibus" was made, and for the purpose of restraining the power of alienation, for that Statute provides that

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that the donee should not aliene the land, so as to defeat the heirs if he should have any; or if he did not have any heirs that he should not aliene so as to prevent the reverting of the land to the donor. — It required the will of the donor should be consulted. But in the construction of this Statute, the judges held that the birth of issue was no performance of the condition, so as enable the donee to aliene — but they divided the estate into two kinds, — one they called a fee tail, this they treated as vested in the donee, and descended to his heirs but the ultimate fee expectant they called a Reversion which resided in the donor. And from this originated an estate-tail — for at C. L. no estate-tails were known, what was by the Statute was a fee tail, was at C. L. a fee conditional. 2 Bea. 111. Litt. text § 13. 2 Bl. 112. 113. 1 Cru. Dig. 32.

But this statute did not convert every fee conditional at C. L. into a fee tail — for the only word used in the statute to designate the subject of this species of estate was the word tenement.

This word includes all corporeal hereditaments, and incorporeal, too, savoring of the realty. now if an incorporeal hereditament savoring of the realty is limited, it is an estate tail.

But an incorporeal hereditament, not savoring of the realty, is not an estate tail. and therefore such a tenement is a fee conditional at C. L. But they are the only subjects in which a fee conditional now exists. Every thing else is by the Statute converted into a fee tail.

An annuity E. g. is an incorporeal hereditaments not savoring of the realty: for it is not chargeable on the land but on the person of the donor. If then it is granted to one and the heirs of his body, he has a fee conditional at C. L.

1 Inst. 19. 20. 1 Atk. 2 Bl. C. 113. 1 Cru. Dig. 25.

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You will perceive, then, that if an incorporeal hereditament, not savouring of the realty, is limited to one and the heirs of his body, the grantee may alien on the birth of issue.

A mere personal chattel, can't be entailed — for if granted to one and the heirs of his body, can it create a fee conditional at C. L.? The reason is, a chattel interest does not admit of so high an estate. If then one has a chattel interest for 1000 years, and limits it to A. and his heirs, it vests in A. absolutely. It does not create a fee conditional at C. L. nor a fee tail, nor any other fee. But he is entitled to it the same as if the words "heirs of his body" had been omitted. 1. Inst. 20. 2. [illegible] 394. 10. Co. 87. [illegible] 95. 3 [illegible] 207. Fearne 304. 5. 342.

But tho an estate tail cannot be created in a personal chattel, yet a remainder, in a chattel interest may be limited even after a like estate, by way of executory devise. The distinction of this, will be treated of, hereafter, under "executory devises" — a remainder may be thus limited, by words which in a conveyance of real property, would create an estate tail by implication. As if a chattel interest is limited to A. after the estate to B. if B. dies without heirs — it will in an executory devise, vest the remainder in A. for it manifestly appears he meant A. should take, if B. died without heirs. And tho these words used in a conveyance of Real Property, would create an estate tail, by implication, and tho a fee tail can't be created in a chattel interest, in deeds, yet in a devise these words will limit the remainder for life. [illegible] 663. [illegible] 209. 1 [illegible] 270. 1 Bos. & P. 215.

The C. J. above anticipates the rule, that an estate tail may in a devise be created by implication, tho in deed it can't be. [illegible] 55. 3 [illegible] 137. [illegible] 2 Atk. 898. 6 [illegible] 234. Fearne 171. 386. [illegible] 371.

So also if a devise is made to A. and "his heirs male"

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[illegible] words are satisfied give a fee and if he die without heirs of his body, to B. A takes an estate tail. for the generality of the clause "his heirs forever" is restrained by the subsequent clause "heirs of his body" – they can't both stand. If they are to retain their strict legal import it will create a palpable incongruity, and it is evident that the meaning of the donor was that if he died without heirs of his body it should go over to B. And this is the precise case of an estate tail – it's true of a devise – not of a grant. Fearne 171. 801-2 _ 7 T.R. 5?6.

And it has been settled that if a devise is made to A. & his heirs forever" and if he die without heirs, remainder to B. yet it will be an estate tail in A. – provided B. is a collateral heir to A. – otherwise not – for there are no other words which so [illegible].

The reason of the rule is manifest for if B. is a collateral heir, it is apparent he would not use the word heirs generally to denote heirs general – but heirs of his body. [illegible] 2 Ley. 5 T.R. 337. 3 Al. 145. 2 Bl. R. 211. For different species of estate tail see 2 Bl. 113-4

They are divided into general and special, tail male and tail female – tail male special, and tail female special. see Littleton § 14. 15. 16. 26. to 29.

An Estate in tail male is an estate limited to one & his heirs male of his body, if limited to heirs female of his body – to the female heirs.

The case of an estate to heirs male the estate must be deduced wholly by males, & so e converso. Then if an estate is limited to A in tail male, and he has a daughter who has a son, that son can't take the land, for he [claims] thr. a female which is not permitted, & so e converso. Litt. § 24. 1 Inst. 25. 2 Bl. C. 114.

The reason why he can't inherit is because his mother being a female, could not inherit — it follows that his right of inheritance, must be traced thro' her. — but he can't — for it never vested in her.

So the word heirs is indispensable in a deed to create a fee, any kind of the word "body" or even the word of procreation is necessary to create a fee tail. To create an inheritance there must be words of inheritance only. To create a fee tail must also be words of procreation as well as inheritance — for without, then no particular heirs are designated — and therefore the heirs general take it. 1 Inst. 21. 2 Vol 114. 5. 391.

If the, either words of inheritance, or of procreation, are omitted in a grant a fee tail cannot pass. Then if an estate is limited to him & "and his issue", his heirs will not take, — it only will create a life estate — for it is indispensable the word heirs be used to create a fee. So if the word Children, Offsprings &c are used it will create only a life estate. Idem —

In some cases they may take as tenants in common with heirs — as I shew by & by — but then there is not the case they may take nothing at all.

If words of inheritance are limited by other words, then words of procreation; the former restrictive words have no effect — if they did, a new species of estate would be created, wholly unknown to the law. If an estate is limited by these words "to A and his heirs male" it will pass a fee simple — and so if "to him & female". It does not create a fee tail, because there are no words of procreation — if there had been "of his bodies" used, it would then have been an estate of special tail.

The reason why an estate can't be created to give effect according to its words is that no new estate is to be created. And the reason why a fee simple is created is, because

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because the grant is to be taken most strongly against the grantor.
Litt. § 31. Co. Litt. 27. a. 36. 5. T. R. 336. 2 Bl. 114. 121.

Such a grant in England by the King is to no estate.
The rules of construction yields to the royal prerogative.
2 Bl. 121. 5 T. R. 337.

But a devise created in these very words, creates a fee tail-
because the intention in a devise, as in deeds, is to be considered-
and because in a devise it may be inferred from other words than
those which in deeds, the Law has made absolutely necessary.
2 Bl. 381. 5 T. R. 337.

This then is a case when an estate tail may be created
in a devise, without words of procreation. In deeds you
see that these words as well as those of inheritance are indispensable. And on the other hand - a fee tail can be created
in a devise without words of inheritance, as to "A. and his issue"
or to "A. and his posterity". Lit. B. 1. 74. 2. Bl. C. 381. 114.

So also in pursuance of the same rule, if land is devised
to A. and his Children, he having no Children at the time
a fee tail passes - Why does a fee tail pass? Because it is
manifest that the intention was to give to the issue in some
way. Not they can't take with the father, for they are not
in esse. Nor are they intended to take as remainder men.
For then would take as purchasers and the devise would
be Executory. But then it is immediate - It is then held
in this world, that they must take as heirs of the body - for
they are to take with the father, or as remainder men, or as
heirs of the body. And it not in this form they can't take at all.
5. Co. 17. Lt. n. 227. 231. 1 Bulst. 21. Doug. 306. 357. - 16.
1 Mon. B. 1. 56. 1. 61.

But under a devise to "A. and his Children," he having
Children at the time, they will take as joints tenants for
life.

Things Read

They can't take an inheritance for the word heirs is omitted. And it is further to be observed that the children only shall take in esse at the time of the devise will take — for no other persons sufficient to satisfy the words of the devise and the existence of children at the time, meets the presumption that the future children were intended to take. 2 Co. 16b. 17b. Fro. R. 743. Comyn. Dig. 1 Ves. 184. 1 Coust Eq. 60.

But if a devise to A and after his death to his children & A having children, he will have an estate for life, and the children a remainder for life, for no inheritance can pass, as no "heirs" is inserted. And the word children being a word of description, and not of limitation, they will take as remainder men, for life. This is manifestly the intention — they can't take with A. for the words after his death will prevent. The after born children will take however as well as those born at the time the devise — for a devise "to the children" is prospective till the time of his death — it is not to his children in esse at the time it is made. a posthumous child will take. 6 Coke 16b. 1 Sm. L. C. 2 Penn. R. R. Bacy. 306. Comyn. 301. 314.

The rule in this case is clear, where the limitation is to A. & having children so if a devise is made to A. and after his death to his children, he having no children at the time, but they will take tho born after the time of the devise. for here the operative words are prospective, and the words of the limitation are not to immediate devise, but contemplates a future birth of them. 6 Co. 17a. Comyn. 314. —

And that the rule is as argument in a case in Bacy. Ab. 16. I. But I believe the case to be the same in the U.S. as in the former case.

For estate is limited to A. and the heirs female

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of his body his female issue will take as issue in tail, even tho he has a Son who is strictly speaking his Lineal - for at Com. Law. the females cant be heirs, if the person has a Son, yet they come within the description of the limitation. 1 Inst. 24b 27b note 2 4. Ewers. Ld 36.

It was formerly holden however that if an estate was limited to the heirs female of A as purchasers, and A had a Son the daughters could not take - and the reason was that, tho they were female issue yet having a Son they cannot be heirs. This rule is now deemed to be Law, and it appears to be well settled - that they will take - tho if an estate is limited to A and the heirs female of his body - they will take as purchasers, tho there be a Son. - for it is clear that the intention was the heirs female should take.
1 Inst. 164a note 2 5 Burr. 2615 1 Fonb. 4, 22. 3 Salk. 336. 2 P. Wms 1. 10 Mo. Eng. 52. Feane 32. 147. For the old rule see 1 Inst. 24b 27b Hobart 29.

The incidents to a tenancy in tail are 1st that the tenant is not liable for waste. 2nd that the tenants wife is entitled to Dower in the estate. 3rd that the Husband is entitled to courtesy - tenancy 4th that the entail is liable to be docked by a fine and recovery, or by a lineal warranty descending upon the heir with assets. 1 Inst 224. 1 Bl. 115. 116.
For fine and common recovery 2 Bl. C. 347. to 360. and for a description of a lineal warranty. 2 B. 300. to 313.

The tenants right to levy a fine or suffer a common recovery is inseparable, from the nature of an estate tail, as much as is a right of alienation in a fee simple - if then in an estate tail there is a proviso that the tenant shall not suffer a fine or it is void - for it is repugnant to the nature of the Estate. 4 T. R. 603. 9 H. 61.

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There is no rule in Connecticut to suffer a fine or common recovery for the purpose of docking an Entailment for it is provided by a Statute law that every estate tail shall become an absolute fee simple in the immediate issue of the first donee.

Our statute law then docks the estate tail on the death of the first donee, as an estate tail is thought to be inconsistent with our laws, where an equal distribution of property among the heirs is to be made.

This is precisely the case of a fee conditional at Com. Law. For on the death of the first donee, his immediate issue take a fee. Statute Connecticut 4 B. Thus far of freeholds of inheritance — Now

Of freeholds not of inheritance

All freeholds not of inheritance, are estate for life or lives and this is the lowest species of real property. Strictly speaking, a freehold, is real Estate. And any thing else is not real estate. A term for years, ever so great is a chattel Interest.

These freeholds not of inheritance are either conventional (that is, those created by agreement, or by the act of the parties) or legal (that is created by act and operation of law.) 2 Bl. 120.

Conventional estates for life, may be for tenants own life or for the life of another, or for any number of lives. Thus an estate may be granted to A. for his own life, or for the life of B. or for the lives of A. B. & C. & D. in which latter case the estate continues till all named are dead.

Legal estates for life, are always for the life of the tenant. The law never creates an estate for the life of another. For Estate pur autre vie is always conventional. Fidem.

For your precise — when an estate is created for the life of

Of Freehold not of Inheritance

another the estate may continue after the death of the tenant. In such case it is a rule of Law, (that is where the tenant dies before cestuy vie) and there is a limitation to his heirs. The heir will take as special occupant. But if it not thus limited, it goes for the first occupant a jacens hereditas, and any one may take it and hold it for the life of B. Now however by the Statute 29 Car. II^{d} and 14 Geo. III^{c} an estate holden for the life of another, and he dies first, he may devise it — and if he does not, it will pass in a course of distribution to his personal representatives. Now then there is no such thing in England as a jacens hereditas for by the Statute it is not open for the first occupant, for he may claim it if he will, and if he does not, it will be distributed among his personal Representatives. 2 Bl. 120. Litt. text § 56. 1 Inst. 41. 2 Bl. C. 258 to 261.

It may perhaps admit of a question whether this species of Estate in Conn. will admit of a devise. But I apprehend it will on account of the generality of the terms of our Statutes which words are "lands or other Estates". This is an estate and one continuing after his death, and not such an one as can defeat the rights of any one — therefore I think he may devise it, under the words and "other Estates." Stat Conn. 42. If it is not devisable what is to be done with it? I have no doubt but our Courts would adopt the English Statute & distribute it among his personal Representatives. An Estate for life being a freehold, it cannot be passed without livery of seizin at C. L. This rule of C. L. is now evaded by a deed of bargain & release & a deed of bargain and sale. — Litt. § 59.

A general grant of lands, Tenements & hereditaments without defining any specific Estate or quantity of interest passes a life Estate, and for the life of the Grantee. He shall take the largest Estate the words will bear which is a life Estate, and for his own life. — Thus if the words are for term of life generally, without naming

ing

naming whose life, it is a life Estate for Grantee own life. 1 Inst. 42, 36. 2 Bl. 121.

And here an important rule is that any Estate, except at will or sufferance, which having no determinate duration in the grant which by the possibility of it may last during the Tenants life it is a life Estate. As if an Estate is given to a Woman during widowhood, it is a life Estate for she may die a Widow. So to one till he shall marry" or "till he leave the realm," then an life Estate (He may never marry or leave the realm. 3 Co. 20. 1 Inst. 42. - 2 Bl. 121.

The incidents to a life Estate whether legal or conventional are principally these. 1st. The Tenant, if not restrained by Covenant or Agreement, may by common right take reasonable estovers, as wood to burn, to make instruments of husbandry, to repair houses & hedges. But he has regularly no right to cut timber for any other purpose than those mentioned - if he does he is guilty of Waste, and will forfeit his Estate, and be liable in damages. He has this right to reasonable Estovers to uphold his Estate, to keep the Estate in repair; But he has no right to take wood to sell it, or to erect new buildings he is to keep & leave the Estate in statu quo. 1 Inst. 41, 53. 2 Bl. 35, 122.

2dly. A Tenant for life is not to be injured by any sudden determination of his Estate, unless it is determined by his own act. Hence if after sowing a Crop he dies before harvest, his personal Representatives have a right to the Emblements and may have reasonable time to take them off. The rule is founded on the maxim of the law "actus Dei nemini facit injuriam."

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The word "Emblements" in the Law signifys those growing by annual labour; Therefore the Personal Representatives are not to have a Crop of Fruit, or of Hay &c. So if he holds pur auter vie, and the latter dies in the interval the Tenant has a right to the Crop - for it is the act of God. 1 Inst. 55. 2 Bl. 123.

The rule is the same where the Estate is determined by operation of Law - Thus if the Estate is limited to man & wife during Coverture and a Divorce a vinculo &c. takes place between the time of sowing & harvest, the husband lacks the Emblements not the wife - for he is entitled to her labour during Coverture. 5 Co. 116. But if an Estate for life is determined by the tenants own act the tenant is not entitled to the Emblements - for the principles of natural justice do not here declare for him; as if the tenant between sowing & harvest commits a forfeiture of the Estate, he has no right to complain that the Emblements go with the Estate - So if the tenant holds during Widowhood & marries she cannot take the Emblements, for by her own voluntary act her estate is forfeited.

3.dly But as to Lessees of Tenants for life, they have not only the same, but in some cases greater privileges than the original Tenant for life, as if the determination of the Estate happens by the voluntary act of the original Lessee which he the underlessee could not controul, he will be entitled to the Emblements, as if the Tenant for life holds during Widowhood and marries; but if he concurs in the act, he will forfeit it, as if he marries the Tenant himself. There is no such example as this but it is agreable to analogy and reason. Cro. C. 461. 1 Roll Rep. 327. 2 Blackst. 124.

Illinois Real

And at C. L. an under Lessee might on the death of the original Tenant may leave the premises, and avoid all the payment of rent from the last day of payment, now if it is a general rule that if the Lessee's Estate determines between the days of payment, he is not bound to pay more the last pay day for rent at C. L. is not apportioned, none more till the day of payment. But now by the Statute 11 Geo. II. he is obliged to pay pro rata - a reasonable apportionment is to be made 10 Co. 127. 2 M 124.

And it is true of every tenant for life, that if he underlets for years and dies during the term, the lease is determined by his death, unless it is confirmed by the reversioner or remainder man as if S. S. who holds an Estate for life leases for 20 years to J. N. and dies in 10 years after J. N. lease is determined - for S. S. cannot create an Estate greater than he himself held, so one to continue after his has determined But if the Estate for years is confirmed by the remainder man &c he will hold it. Litt § 516. 3 Bac 397. Bof. 105. Coup. 1185. 1 T.R. 86. This for of Incorporeal Estates.

Life Estates created by operation of Law are of three kinds - 1st a called Tenant in tail after possibility of issue extinct This is an Estate held by a person to whom an Estate in special tail has been limited and the person from whose body the issue was to spring has died without issue; or having had issue it is become extinct.

Thus if an Estate has been limited to A. and the

heirs of his body by his Wife S. and the dies without issue or having had issue they are extinct, & A is Tenant in tail after possibility of issue extinct. It is now impossible this Estate should descend - The person from whom the issue was to spring, is dead and if she had one issue they are now extinct, therefore from the moment that the wife dies the possibility of an issue is extinct. Litt. § 32. 2 Bl. C. 124.

Now this species of tenancy is called an estate for life for heaven it is impossible it should descend. It cannot be an inheritance, tho it once was - This species of Estate can be created only in the manner mentioned above. It cannot be created by grant. A Tenant in fee simple can create an Estate for life with the same incidents, but it is not an Estate of this kind, it will be a conventional Estate.

If then an Estate is limited to A. and his Wife and to the issue of both their bodies and they are divorced a vinculo matrimonii, this is not an Estate of the possibility of issue extinct for by the supposition they are both alive. They have a life estate - it is not descendible. 1 Inst. 28.

But the law always supposes the possibility of issue to exist till that possibility is extinguished by the death of one of the parties, therefore, whatever may be the age or infirmity of the parties, this species of Estate cannot exist, while both are alive; ~~xxxxxxxxxxxxxx~~ nothing but death rebuts the presumption of possibility of issue. Litt. § 34. 1 Inst. 28. 2 Bl. 125.

This Estate is of a mixed nature, it is in most respects like an Estate for life, but it does not have all the incidents of an Estate of inheritance. This he is like a Tenant for life; because he forfeits his Estate by

aliening in fee), but he is like a tenant in tail, because he does not forfeit by committing waste. The law has not yet to deprive him of his Estate if he alians in fee to destroy the reversion. But the law does not consider the commission of Waste as sufficiently injurious to the reversion, as to punish him for it the commission of it with forfeiture of the Estate. 1 Inst. 27, 8.

But tho he does not forfeit the Estate for committing waste as by cutting timber yet the timber belongs to that person living at the time, who had the first remainder of the inheritance. But if an Estate limited to A in special tail, remainder to the unborn Child of B. and remainder in fee to C. - and A commits waste before the birth of Bs child, the timber will belong to C. for he is living at the time and the intermediate remainder man is not living. 2 P. W. 240. 2 Bl C. 125.

I suppose the reason of it is this, that the timber being cut being personal property subject to be removed and to decay, it is not proper that the property should rest in a contingency and should be vested in a person who is not and may never be in esse - In all other respects however than that of Waste, a tenant of this species is precisely like a tenant for life, and hence he may make a deed of exchange with tenant for life. 2 Bl. 126. 323.

2 & 3 A Legal freehold of the 2d class is called a tenancy by the Courtesy of England. This is to be explained rather by description than by definition.

Things Real

When a man marries a Woman seized of an Estate of inheritance and has by her issue born alive & capable of inheriting the Estate & surviving her is tenant by the Courtesy. Litt. 35. 52. To this

There are four requisits, marriage, seizin of the wife, issue born alive, and death of the Wife - 1 Inst 30, 217.

1st There can be no such thing as a tenant by the Courtesy unless there has been a marriage. This marriage too must be legal, for a man cannot acquire the mutual rights unless it be legal marriage - If there has been a marriage de facto he cannot be tenant. The

2d requisite is seizin - She must have been actually seized, a bare right of possession is not sufficient to entitle the husband to the tenancy for if there had been issue, they could not inherit the not being seized, therefore he cannot have Courtesy - for he can have it only in those cases in which she could have an heir to the land. 2 Lev. 26. 2 Bl. 127, 8. 1 Inst 11.a 15.a 29. 40.

In the case of Bush & Bradley determined in the Court of Errors in 1810 it was holden that actual seizin of the Wife was not necessary to entitle the husband to Curtesy and the reason offered I understand was that the issue could inherit in our Law tho' the ancestor was not seized. This is true. But I doubt the correctness of the decision though the issue might have inherited on the principals of the C.L. practised by us But it is not of great importance. 3 Day 166.

It is a consequence of the English rule "that the wife must be actually seized" that the husband

cant

cant have a Curtesy in a remainder or reversion for the wife was not actually seized But if the reason assigned in the case of Rush, ante, were cannot the husband may have Curtesy, for it is an inherit able Estate. The truth is the reason why the husband is not entitled to Curtesy when he is not seized is that he is considered in fault for not making an Entry & keeping the inheritance out of danger - this is not the only reason but is a sufficient one.

There are two or three cases in Co. Litt which were cited in our Court Case where the children might inherit, and yet he could not have Curtesy - There is an exception to the rule too in case of incorporeal hereditament - i.e. the Husband may have Curtesy without actual seizin in the wife and in an incorporeal hereditament she cant have actual seizin, but there should be what is tantamount to an actual seizin in Corporeal property. Idem.

If a man marries an Idiot he cannot have Curtesy, for there is no actual marriage. 2 Bl. 127, 130, Plow 263. 1 Inst. 30.

3d requisite is issue born alive. Idem.

And the case upon this point is so very scrupulous that the issue must be born during the life of the wife, (therefore, if the issue is born after her death, the husband cannot have Curtesy. I do not see any reason for this very great scrupulosity - but stare scrupulis. 1 Inst. 29. 2 Bl. 127, 8.

And the issue must be capable of inheriting the estate. Hence if the Estate is limited to a woman in tail male and she has only daughters the husband

can have no Curtesy, for the daughters cant inherit
Idem.

The time of the birth of the issue is immaterial if during the Coverture, whether it is born before or after seizin is of no importance, and wether it is dead or alive at the time of her death is of no importance.
Idem.

And a husband may have a Curtesy even in an equitable inheritance of the wife tho she has no legal Estate. Thus if the wife mortgages her Estate, he is entitled to Curtesy in the equity of redemption, if other things will admit of Curtesy. Now it is very remarkable that, in the converse of the case, she is not entitled to dower.
Pow. on Mort. 112 to 115. 1 Atk. 603.

By the birth of the issue the husband becomes tenant by the Curtesy initiate, and his Estate as tenant by the Curtesy is consummated by the Wife's death. 1 Inst. 30. 2 Bl. 128.

Lect.r 5.th May 26.th 1813

The 2.d species of Life Estates created by operation of law is tenancy in DOWER.

If a husband seized of an Estate of inheritance dies, the wife has a life Estate of one Third part of all the lands &c of which he was ~~seized~~ seized at any time during the Coverture, provided any issue she might have had might by possibility have inherited it.

This tenancy you see extends to a Third part only whereas a tenant by the Curtesy extends to the whole.
Litt. § 36. 2 Bl. 129.

The widow in this case is called Tenant in Dower and to entitle her to this Estate, she must have been actually his wife at the time of his death, for the

right of Dower arises out of the relation at the time of death. Of course if they are divorced a vinculo matrimonio the cannot have Dower, for the relation does not exist out of which the right arises. 2 Bl. 130.

But the wife is not barred of her right of dower by a divorce a mensa et thoro, for this does not dissolve the marriage contract. It is in effect saying they shall live separate. She is his wife still 1 Inst. 32.

It was formerly holden if a woman married an Idiot she on his death was entitled to Dower - but this has been overruled - for there has been no actual marriage. 1 Inst. 31. 2 Bl. 130.

By the old C. L. the wife's Dower was forfeited by the Treason or Felony of the Husband, because he forfeited all his Estate, and the King's right was paramount to that of the Wife. It was abrogated by the Statute Edw.d 6. But was restored by the Statute 5 & 6 Edw.d 6. so far as respects Treason. 2 Bl. 130, 131.

But we have no Statute in Conn. of this kind nor can there be by a Statute of the United States, for the Constitution provides that the forfeiture for Treason shall continue no longer than the life of the offender - and "that ~~no~~ shall ~~no~~ attainder of Treason shall work corruption of blood or forfeiture, except during the life of the person attainted." Therefore, they cannot make a Statute depriving a wife of her right of Dower, tho the husband is a Traitor. Const. U. S. art 3.d § 3.d

If a man marries an alien she cannot be endowed by the C. L. or generally by Statutes in the different States. In such case it is usual to procure an act entitling her to dower. Such acts are frequently passed in England.

and in United States. The reason of the rule is that an alien cannot hold Real Property and the marriage does not divest her of her character of alienage. Exception to the rule in England in favour of the Queen Consort. 1 Inst. 31. 2 Bl. C. 131.

No female can be endowed unless she be above nine years of age. The C. L. has fixed the age but she must be above nine. But she may be betrothed before, but if the husband dies before she is not entitled to Dower. Idem

The Estate in which the wife may have Dower must be one in which any issue which she might have had, might by possibility have inherited. It does not require she should have had issue actually. Thus if a man seized in fee marries a Wife and has a son and then marries another wife. She is entitled to Dower, for the son may die before the father, and then if she had issue it would inherit; But if one holds an Estate of inheritance limited to him and the heirs of his body by his wife A. & A is dead, and he then marries B. now B. cannot have dower, for by no possibility can her issue inherit it. Litt. § 36. 53. 2 Bl. 131.

With regard to the seizin of the Husband the law does not require it should be actual to entitle her to dower. A seizin in Law which is a right of present possession is sufficient.

The diversity between this and the case of a mortgage that the wife have actual seizin to entitle him to an absolute Estate by the Curtesy, is that in this case she cannot be supposed to have it in her power to obtain the possession, but it is in his power to reduce her estate into actual possession. If he does not

not he is to blame and is not entitled to Cruelty. 1 Inst 31. Co. C. 303.

And a seizin of the Husband for a time however short is sufficient, so far as respects this requisite of seizen to entitle her to Dower. She when the seizin passes to him and from him to another is instanti she is not entitled to Dower. Thus where a man has seizen of of land by fine and he reconveys it by the same fine, she is not entitled, for the seizin passed thro him in transitu. Co. L. 615. 2 Co 67. 2 Bl. 132.

And the husband cannot by C. L. divest the wife of her right of Dower by any alienation of his own. If he alins during coverture her right remains, for it is paramount to the rights of Creditors and Purchasers. 1 Inst. 32. She may be divested by a forfeiture, but this is a positive rule.

The rule is the same in N. J. & Mass. and probably in other States. But in Conn. it is not so for here the wife is not entitled to Dower in any lands but in those of which the dies seized. The seizin need not be actual however. He may defeat her right by alienation. Stat. C. "Dower"

In England the wife is not entitled to Dower in the husbands equity of redemption upon a Mortgage in fee. But a husband is entitled to a Liability in the equity of redemption in a wifes Mortgage. The reason of the diversity I conceive to be these. That the right of dower was established upon the equity of redemption in a mortgage was considered a mere trust and the mort gagees wife was entitled to dower and the mortgagors wife then could not have it, for if so then could

be two Tenancies in dower in the same estate and this difficulty would increase the more mortgages there were, as if he mortgaged to half a dozen all would be entitled to Dower. But it has long since been settled that mortgagee's wife is not entitled to dower.

Still known tho the Chancellors feel the impropriety of this rule yet they say the authorities are too hard for them. The rule as to the husbands right then was established at a much more auspicious period for his interest, than that as to the wife. But principals would dictate that if there was any diversity it should be in favour of the wife. But established Contra 1 Atk. 606. 3 P.W. 229. Talbot Cas. 138. 2 Atk 525. 1 Bl. R. 138. 161. 1 Bro. Chy 326. Dow. N. 321. to 23. Opin: in 2 P.W. 700. Pre. Chy. 137. 2 Blk C. 138

The husband is presumed to be able to raise the mortgage on the wifes estate, but she cannot on his, therefore the rule on principle is incorrect.

The question has been once or twice raised in Conn and decided she is entitled to Dower in such case and this is the true rule on principle.

But in England the Mortgagors wife is entitled to Dower in the reversion expectant on the Husbands Mortgage for life or for years.

Thus if the husband having an interest in lease makes a term for life by way of Mortgage, she cannot have dower in the mortgage for life, tho in the reversion expectant she may. So if a man makes a term for twenty years by way of mortgage, she cannot have dower in this twenty years not only for above reason, but also because it is a chattle interest in which they cannot

be

to dower. But after the expiration of the Estate she has a right of dower, but it is not in the equity of redemption, but in the reversion expectant, out of which the equity arises. Pow. on Mort. 319 to 321. Fo. Ch. 133. 2 Vern. 423.

Dower by C. L. is to be assigned to the Widow by the husband's heir, or if he is under age by his guardian. For on the death of the husband the heir (and Dowager are) not in any sense of the word tenants in common or joint tenants. But the heir becomes tenant of the whole freehold by his entry which he has a right to make and the widow a tenant under him. Hence he is to assign her her dower. 1 Inst. 34, 5. 2 Bac. 135, 136.

If indeed the heir (as the case may be) his guardian does not assign her dower, or assigns it unequally, she has a remedy by an action at Law and judgment given in her favour the Sheriff is appointed to assign it. Ibidem. Stat. Conn. 240.

The wife forfeits her dower in England by Statute West. 2d. by Elopement with an adulterer, unless the husband is afterwards voluntarily reconciled to her. So by a total divorce. So if she is an Alien. In most cases too by the husband's treason. And if she withholds the title deeds from the heir (this operates only as a bar till she restores them) and finally by Statute Gloucester she forfeits it by alienation of the lands she holds in dower. 1 Inst. 37. 2 Bl. 136.

And the wife may bar her right of Dower by an act at Law by levying a fine or suffering a common recovery during coverture. She cannot

in any other way deprive himself of his right - But in the above case he cannot because he is able to join in a judicial conveyance so as to bind himself but because it is incompetent for him to aver against the Record that he was a feme covert at the time it is an estoppel - But if he join in a deed or grant he is not bound for this will not estop him of averring her coverture at the time 2 Bl. Co. 137.

In Comm. the wife is not barred of Dower even by a total divorce unless she was the guilty cause of it - Where the husband procures a divorce from her for her fault she is not entitled to it if she is not to blame, but gets a divorce from him she is entitled. This is a Statute provision it dont exist at C. L. Stat. Conn. 237.

Nor under the Constitution of U. S. can she forfeit it by the husbands treason. Art. 3. d. § 3.d

But in Conn. & in England she may be barred by accepting a jointure executed before marriage. In equity she may be barred in some cases tho executed after marriage. 2 Bl. Co. 137. vi. Baron & Feme.

It has been a moot question whether under our Statute a jointure which will bar her dower may consist of Personal Property for the Statute after mentioning Lands, Houses &c. mentions or any other Estate". But it has been determined in the case of Sillick in A. D. 1811 that it must consist of Real Property and this is the English rule - and is I think the correct one.

All estates for life whether conventional or legal are forfeited not only by Treason or Felony at C. L. but also by waste, by alienation in fee or in tail, or

or for the life of any other than him for whose life it was granted. This for of Estates of Freehold. Litt. § 415. 1 Inst 251. 2 Bl. 267. 274.

Of Estates less than Freehold.

There are three kinds; Estates for years; at will, and by sufferance. There is hardly such a thing as Estates at Will - but of this hereafter -

An Estate for years is defined to be an Estate for some determinate period, or an Estate for any fixed determinate period is an Estate for years. Thus an Estate for Twenty years, or Three years, or Three months is an Estate for years. The Law in distributing Estates takes no notice of any period less than a year. It do not mean that an Estate for three months will continue for a year, but falls under the denomination of an Estate for years. 2 Bl. 240. Litt. § 58, 67.

He who creates such an Estate is called the Lessor, the tenant or owner is called the Lessee. A year at C. L. is a solar year, but a month means a lunar month, i.e. four weeks - not so in Lex Mercatoria it is a calendar month.

If there an Estate is leased for a year it is holden for an entire solar year - But if leased for four ~~weeks~~ months it is 16 weeks and if for twelve months it is forty eight weeks - but if for a twelve mo. it is holden for an entire year 6 Co. 61. 2 Bl. 141.

And in general the Law takes no notice of the fractional part of a day. If a lease is made

at any time before 12 o'clock at night on the first day of January, it expires at 12 o'clock at night on the 31st of December - a day is considered what Mathematicians call a punctum stans indivisable. 1 Inst 135.

And upon the same principle if one is born at any time before 12 o'clock on the first day of January he is considered of age on the first moment of the 31st day of December tho he may not be 21 years of age by 48 hours - and the rule is precisely the same between the Lessors & Lessees of Estates - and it is of importance to understand, as a question may arise as to what moment the Lessor is entitled to enter.

Every Estate which must expire by its own limitation at a certain prefixed period is an Estate for years - and for this reason it is often called a term for years. 2 Bl 143.

If it is said every Estate for years must have a certain beginning as well as an end, this is true, for if no day is mentioned it commences at the date of the lease & if the day should remain or afterwards become uncertain or contingent it may be rendered certain by proving when it did commence, as if to commence at the day of his marriage, it can be rendered certain, ut supra. Thus Christmas will be a day of commencement ascertained. 2 Bl. 143. 1 Inst 46.

And with respect both to the commencement and duration of an Estate it is a maxim, "id certum est quod potest reddi certum." That is certain which can be made certain by reference to a known standard which is certain.

Thus

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Thus a lease for any number of years which J. S. will name is a good lease if he will name them. 6 Co. 35. But an Estate for so many years as John Stiles shall live is void, because the duration of his life is not fixed or certain, nor is it capable of being made certain while the lease lasts. But why is it not good when an estate granted for & during the term which J. S. shall live is good, for this is a good freehold Estate. Now it can be an Estate for his life, because there is no livery of seizin nor can it be a lease for years, because there is no prefixed duration. So another reason is that it was intended that the Estate should be a life estate. Still however a lease for forty years, "if J. S. shall so long live", is a good one - for here there is a certain fixed period beyond which the Estate cannot endure, tho it may determine sooner. The main requisite of an Estate for years is here observed. 1 Inst. 45. 2 Bl. C. 143.

An Estate for years is a chattel interest and in judgment of Law inferiour to an Estate for life. A life Estate to A. 10 years old is of a higher nature than a lease to B. for a thousand years, tho the first may determine tomorrow. Livery of seizin is not necessary to create or transfer it. Therefore it may be made to commence in future. A freehold cannot and one reason is, Livery of seizin is necessary to create a freehold and takes immediate effect. &c. The Estate from the nature of the thing

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must commence instante ex nunc de data rei - For it can be created only by livery of seizin. But as livery is unnecessary to create a term for years, it may commence in futuro 5 Co. 94. 2 Bl. C. 143.

Hence a Lessee for years can never in strict propriety be said to be seized. He is said to be possessed - for the word seizin ex vi termini implies a freehold.

The possession of the freehold is called seizin - Therefore no Lawyer will declare he was possessed of a fee simple &c 1 Inst. 46. 2 Bl. C. 144.

The word Term is used to signify not only the time or duration of the Lease - But by a natural transition the interest or property the Lessee has. Hence it is often said the term expires before the time fixed has elapsed. It may expire as by Forfeiture. If a Lease is made to A. for three years and after expiration of term to B. and A. dies in one years - B's remainder takes effect immediately - But it is to take effect after the expiration of A's term. 1 Inst. 45. 2 Bl. 144.

Sect. 6th May 27th 1813.

With regard to the incidents of an Estate for years, I observe, that the Tenant has, if not restricted by agreement the same powers as a Tenant for life. 2 Bl. 122. 144.

But with regard to Emblements on the determination of the Estate he is not in general entitled to them, as a Tenant for life - for it is known to him when the Estate will determine, and if it expires before sowing and harvest, it is his own folly to sow them, there is no sudden determination of his Estate. Litt. § 68.

If however a lease for years is defeasible on contingency and is actually defeated before the time limited, other than by his own act he is entitled

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to Emblements. This if a lease is made to A. for twenty years, if J. S. shall so long live. Now if J. S. dies before the twenty years expires, it is a sudden determination of the Estate, he is entitled to the Emblements. So if Tenant for life underlets to a tenant for years and the Tenant for life dies, the undertenant will take the Emblements. 1 Inst. 56. 2 Bl. 145.

If a lease for years is determined between the time of sowing & harvest by the Lessors own act he is not entitled to the Emblements. 1 Inst. 55.

An Estate at Will is defined to be one holden at the will of the Lessor - i.e. one determinable at his pleasure. It is however determinable at the Lessees pleasure. It would be a more correct definition to say it was an Estate holden at the will of both and determinable at the pleasure of either. Litt. sect 568. 2 Bl. 145.

It is manifest, then the Lessee has no certain indefeasable Estate for any period however short, whenever the Lessor determines the Estate, between sowing & harvest the Lessee is entitled to Emblements 1 Inst 56. 2 Bl. 146.

But if it is determined by the act of the Lessee himself he is not entitled to the Emblements Ibidem.

As to the manner in which the Estate may be determined. It may be determined in the first place, by the express declaration of the Lessor that the Lessee shall hold no longer. It must however be made upon the Land, or notice given to the Lessee, that he shall hold no longer. It may also be determined by the entry of the Lessor upon the Land and exercising any act of ownership as by cutting timber. Ibidem & 1 Vent 248.

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An Estate at will is also determined by the Lessor making a feoffment or a lease of it to commence immediately - for the feoffment cannot stand consistently with the Estate at Will, the latter then determing. But if a lease is made to commence in future, the Estate at Will does not determine till the time of the lease arrives. 1 Roll. 860. 2 Lev. 88.

It may also be determined by the Lessee assigning his interest; - by committing waste, or refusing to hold any longer, and finally by the death or outlawry of either of the Parties - It is determined by an assignment, because his interest does not admit of an assignment. It is not in its nature assignable. Committing waste is a forfeiture of course as it is a forfeiture of higher Estate, death will determine it, because it is not any longer possible that the party can consent that the relation should continue. For the same reason outlawry determing the Estate for a Judgment of Law he cant continue his will that the Estate should continue. 5 Co. 116. 1 Inst. 32, 55, 62. 2 Bl. 146.

If the Lessor determing the Estate, the Lessee has a right to the Emblements, provided it is determined between sowing & harvest. Litt. § 69.

If rent is payable quarterly or at any other period and the Lessee determing the will, he must pay the rent, to the end of current period 3 Co. 26, if Lessor determing it. Sidenfin 339. Salk. 414.

But those Estates which were formerly called Estates at Will, have of late been construed as tenancies from year to year, so long as the parties

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pleas. Courts began to construe them Estates from year to year in that cases where there was annual rent reserved. because it was fair that the Estate should not be determined by the Lessor in the middle of a year. But now all them which were Estates at will are now construed in the Courts of Westminster Hall, to be tenancies from year to year. 2 Bl. 147-145. Ch. notes - 8 T.R. 3 - Esp. Di 190 - 3 Bar. 1609.

Now the prein difference between a tenancy at will and one from year to year is that the latter cannot be determined at the pleasure of either party except at the end of the year and then not without reasonable notice to the other party which is generally understood to be half a year. 1 T.R. 159. 163. 3 T.R. 436. 437 - 4 T.R. 361. 7 T.R. 64. 85 - 8 T.R. 3.

And tho either of the parties should die, yet notice is necessary as if both were living. Thus if the Lessor dies his heir, if he could determine the Estate must give notice to the other party, if the Lessee wishes he must give notice to the Lessor if he would determine it and if the Lessor wishes to determine it notice must be given to the executor. 2 T.R. 169. 3 Wils. 25 2 Bl. 147 - Ch. notes.

By the English Statute of Frauds & Perjuries it is enacted that parol Leases for any term exceeding three years shall be construed to be Leases at will yet they have been construed to be ~~Leases~~ not at will but tenancies from year to year - It cannot be a lease for years known by the Statute but must be in writing. 1 Bl. 3. 2 Bl. 145.

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In Connt no parol lease for any time however short, is valid as a lease. It operates as a license to excuse a trespass, but not a lease at will giving a right. Statute Connt. 334.

Estates at will then you perceive can hardly be said to exist. And according to the modern rule I take it to be universally the case that what were formerly Estates at Will, are at present in England converted into tenancies from year to year.

It follows from the rule before laid down that notice to quit by the Lessor, at any other time than at the end of the year, is not operative. If then notice is given before the end of the year to quit the end of Ten months it may not effect, or if it is to quit Two months after the end of the year it is not operative, he will continue that year likewise and he will continue till regular notice is given him to quit at the end of some year. 1 T.R. 159

Still however where general notice to quit is given and no particular time is specified the party giving it is presumed to mean the end of that year, & it is good. 1 T.R. 159. 2 Bl. 147 Ch. notes

If the Landlord after having given notice to quit at the end of the year receive rent which accrued after the end of that year, he is considered as waiving the notice, and the Tenant will hold the succeeding year, and must give fresh notice when he wishes the Tenant to quit - unless first he affirms the tenancy for the year. 6 T.R. 217. 1 H. 311 2 Bl C. 148. Ch. notes

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If the notice given does not conform to the requisites of law for the year in which it is given it cannot operate for any succeeding year. Suppose he gives notice to quit at the end of eleven months. Now as this notice is not good for that year — so neither is it good for any succeeding year. 2 Bro. Ch. 161. 2 Bl. 147 Notes.

But part of notice can never be set up by a Tenant who denys the title, he cannot be considered as a Tenant from year to year and if not so, he is not entitled to notice. a tenant at will holds by the consent of the parties and if he denies the title he abjures the character of a Tenant under him. 2 Bro. Ch. 161. 2 Bl. C. 147.

If there is a lease for a year and the Tenant continues in possession after the expiration of the year with the Lessors Consent he is considered Tenant for another year — But he is not considered as Tenant from year to year but a tenant for one more year, on the original terms, this is implied from the tacit agreement of the Lessor in suffering him to remain. 13 R. 162. 1 Bos. & P. 135. 258. —

Thus far of Tenancies at will.

Estates at Sufferance

If one come into possession of land by lawful title and after ends his possession without any title he is considered as Tenant at Sufferance. If it is a lease it must be of for one year, and after the expiration of the time he continues in possession without Lessors consent he is a Tenant at sufferance. 2 Bl. 150. 1 Inst. 57. —

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Formerly if a lease at will was made to A. and on the days day which determined it will be continued in possession without lease, he was considered a Tenant at sufferance. But now he is considered tenant from year to year.
3 Wils. 25. 2 T.R. 159. 2 Bl. 150. Chs notes

This Estate may be determined at any time by the entry of the true owner. But before entry he cannot maintain an action of Trespass vs. the tenant for he acquired possession lawfully and is presumed to have lawful possession till some act of ownership is made - ergo the owner must manifest that unlawful holding by the public act of Entry.

If then a Tenant holds over, and becomes Tenant at sufferance, the Lessor cant recover in an action of Quare Ejectum Fregit till after entry is made for if he does the Lessee will recover, for there is a positive rule of law agaist any an Entry to rebut presumption of the lawfullness of his possession. 1 Inst. 57.

The Landlord may maintain an action of Ejectment after making an actual entry and not before. In ordinary cases of Ejectment the possession is fictitious, but here the original possession being lawful an entry must be made. 5 Mod. 384. 2 Bl. R. 151.

In connecticut I do not think that actual entry is necessary in any case whatever for the purpose of maintaining Ejectment. It is not necessary even by fiction of law. Our Courts have decided that a formal a formal entry on Lands did not enhance the goodness of the title, ergo not necessary.

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It follows then that an Estate at sufferance is not known in Com.t Law may be considered as a tort for Entry is not necessary I think in any case - This estate is almost unknown in the English practice 2 Bl. 150.

A Tenant at sufferance you will perceive then is not entitled to notice to quit. There must in Eng.d be an Entry - and the action may be brought immediately after 17. R. 93. 162 - 2 Bl. 150-151, Ch.s note -

Of Estates in Possession, Remainder & Reversion.

I would premise that there has always prevailed among Students an idea that this title is of extreme intricacy. But I think it is unfounded. I believe it may be made plain & perfectly intelligible with attention - It is of great importance, based not on a heap of positive rules without any reason, nor rests on them alone. It is true particular cases will involve intricate questions and so will particular cases in every other title of the Law.

I have thus far been considering Estates with reference to the quantity of interest in the owner. I shall now proceed to consider them with reference to the time of their enjoyment. Estates under this view are divided into Two kinds, Estates in possession and Estates in expectancy.

Expectancies are also of two kinds one created by act of the parties called a Remainder, the other by operation of law called a Reversion. 2 Bl. 163.

Of Estates in possession there is hardly any necessity for a definition, all the Estates spoken of in the

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Rights are considered Estates in possession unless the contrary appears, and not Estates in expectancy. All the Estates I have treated of are Estates in possession.

It is more easy to describe than to define an Estate of possession. By an Estate in possession a present interest passes as well as a right of present enjoyment. It follows then that an Estate in possession in contradistinction from an Estate in expectancy that actual possession is not necessary. Whoever has present interest in land and a right of present enjoyment has an Estate in possession, and these two united distinguish an Estate in possession from one in expectancy. Indeed these two united are the universal characteristics of an Estate in possession. 2 Bl. C. 163. Fearne 1. Powell on D. 247.

Suppose then A. conveys to B. a deed of a farm of Land to hold in fee simple. Now as this Estate does not by the terms of the conveyance depend on a contingency or to take effect in future it is not an Estate in expectancy, but an Estate in possession tho the grantor should refuse to deliver it up.

An Estate in Remainder is not limited to take effect and be enjoyed after another Estate in the same subject be determined. Thus if Bl. own a farm leased to A. for years and after the expiration of A's estate the remainder over to B. has an Estate after the Estate of A is determined. This falls within the definition already. 1 Ves. 1. 195. 2 Bl. C. 164.

These two Estates are in the law considered but as one Estate. Both together are considered no more than one fee, all together is considered one Estate, or Estate. So if there are a number of Estates, to A. B. C. and

remainder to D. in fee, they all amount to one interest on the Mathematical rule that all the parts amount to one whole and are only equal to it. 2 Bl. 186. Id. supra (2 Woo. 186.)

It follows then that no remainder can be limited on a fee simple, for a fee simple includes all the interest which can be enjoyed in a given subject Plow. 29. 2 Bl. C. 164.

The most proper word to create a remainder is the word "remainder" itself, it is the most appropriate, but it is not indispensible; other words showing an intention to limit a remainder will create a remainder, as I give, grant to A. for life and then to B. &c. Pow. Dev. 242. Plow. 134 - 159 - 170.

Certain general rules applying to remainders in general
1st To create a remainder there must be a particular estate precedent to the Estate in remainder in all cases - for the purpose of supporting it when a freehold remainder is created. This precedent Estate is called the particular Estate and in law a particular Estate, and a remainder are correlative. Every remainder is preceded by a particular Estate & every particular Estate is followed by a remainder. 2 Bl. C. 165. 1st Inst. 49. Plow. 25. 34 - Pow. on Dev. 242.

If the inquiry arises why a particular estate must precede a remainder, I answer the word remainder is a relative term. It implies something preceding it. The rule which says it must be preceded by a particular Estate does imply that there can be an Estate in future created without a particular Estate. For a future Estate not of freehold may be thus created. But it will not be a remainder, it falls under another head. Suppose there an Estate for years is limited to commence twenty years hence. This is a future

Estate, but it is not a remainder, for it is not a residuary part of an interest disposed of. There may be then an Estate made to commence in future without any particular Estate preceding it. 2 Bl. 165.

But a freehold Estate cant at C.L. under any circumstances be made to commence in future. cf. Freehold remainder may be made to commence in future.

A fee simple to commence tomorrow is void, so if a man grants a life Estate to A. to commence tomorrow it is absolutely void. cf. Freehold Estate must take effect i.e. vest immediately either in possession or remainder. The reasons why a freehold cannot be created to commence in future, are 1st Because livery of seizin is necessary and it operates instanter - The Grantee instantly seizes the moment livery is made - 2d There must always wherever there is a subject in which there may be an Estate of inheritance, there must be at common law a tenant to the praecipe. If there is not there is no one vs whom the real owner may maintain an action to recover the Land - e.g. A claiming the fee makes a conveyance in fee simple to commence to morrow. Now there is no person vs. whom an action may be brought to day, for to day there is no tenant to the praecipe and if it may be created one day hence, so it may be granted to commence twenty years hence, and if that were allowed there could be no real action brought vs. the Grantee because he is not in possession and none vs. the Grantor, because he has only an Estate for twenty years - The remedy would be to totally suspend during the term. 5 Co 94. Fearne 234-2 Bl C 165.

There is an exception to the rule in case of a Freehold Grant granted de novo. There cant in this case be livery of seizin and there is no such thing as ousting the real owner a grantor,

of his right to issue the rent. & unless the rent be any granted de novo, there is no one who owned before him who now can claim it. If one already has a freehold rent he cant grant a part of the rent to be a freehold to commence in future for some one owned it before who might have a prudent right to issue. But if there is no freehold rent in esse that is one granted de novo, no one can possibly claim it under a prudent right. The Estate in this case, tho a freehold is good, except in this case and some analagous to the rule above is universal. 2 Vent. 204. Co. Lit. 29. Plow. 155. 1 Lev. 122. & Salk. 577.

It is necessary to recur to the rule "that a freehold cannot be created to commence in future, but must vest &c." for the purpose of explaining a vested interest —

A Vested interest is one of which there is a present fixed right of present or future enjoyment. Thus if an Estate is granted to A. & his heirs forever, A. has a present fixed right of present enjoyment. If an Estate is granted to A for life and with remainder to B. in fee there is a present fixed right of future enjoyment. In the former case A is vested in possession. In the latter A vested in Remainder. An Estate vested in possession is an Estate in which there is present fixed right of present enjoyment. But there is a material difference between an Estate vested in possession and one vested in interest. This latter is where the right of enjoyment is future, a contingent Estate or Estate not vested is one which is to commence on some future uncertain event, no present fixed right of enjoyment at all. As if an Estate is limited to A. for life remainder to B when C. shall return from Sea or when C. shall have a son. Here an uncertain. he may never return or have a son. 2 Comm. 1 2.

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The object of the rule that the freehold cant be created to commence in future is to prevent the freehold from being in abeyance. The living of mezin is one of the reasons of the rule. For 1st. The freehold being in abeyance tended to put the freehold; and it could not be aliened, while in abeyance. 2d. while it was in abeyance there could not be a Tenant to the precipe put ante y. 3d because according to the feudal rule it was not permitted to be in abeyance because the lord during that time would be deprived of his feudal services. 2 Wood 230. Fearne 234. 2 W. Bl. 1161. 2 Bl. 302.

The meaning of this rule as applied to Estates in remainder, is that when a freehold in remainder is created, a freehold must pass from the Grantor at the creation of the particular estate, Emphasis the word "a" because Bl. emphasizes the word "the" incorrectly. as if the freehold must pass from the Grantor. He means only that a freehold must pass. He means the freehold or a freehold of a particular kind as a freehold remainder. In the case of contingent remainders a freehold remainder does not pass, if it did it would not be a contingent remainder, the rule does not require that the freehold should pass.

It is true one principal foundation of the rule has ceased to exist, that is that there cant be a tenant to the precipe if create to commence in future, it has ceased because real actions have almost ceased to exist and given way to the action of Ejectment. So too has the reason originating from the feudal services ceased.

And

And the supply of another grant (i.e. livery of seizin) has ceased except in failure of heirs and has been superseded by two fictitious modes of conveyance, viz. deeds of Lease and Release and Bargain and sale.

To illustrate the rule that where a freehold remainder is created a freehold must pass from the Grantor at the time of creating the particular Estate - Suppose a grant to A for years remainder to B in fee, now the freehold is immediately in B. He has a present fixed interest, To commence in future.

But suppose an Estate is limited to A. for years and the remainder is to vest in the unborn son of B. now ~~no freehold~~ the remainder is not good for no freehold passes at the time of creating that Estate, for the Granted in remainder is not in esse. If it is granted to A. for life, remainder to the unborn son of B. the remainder is good. The freehold does not pass but a freehold passes to A at the time of creating his life Estate. 2 H.C. 166 to 169.

A Lease at Will is not sufficient to support any Remainder. It being so slender and precarious an Estate depending on the Will of the parties as not to be deemed a part of the inheritance. It is true a Chattel Interest may be created to commence in future but it is not good as a Remainder. 8 Co. 75. Dyer 18. Rep. 151.

If the Particular Estate is void in its creation the Remainder intended to be limited upon it must regularly fail. For in this case there is no particular Estate to wit out a particular Estate a remainder cant take effect. e.g. an Estate given to the unborn son of A. for life, remainder to the unborn son of B now this is absolutely void, there is no particular Estate. If indeed the Estate were limited to the unborn child of A and remainder to B. for years. B may take

take) his remainder as a chattel interest to commence in future but if it were a remainder in fee to B. (as in the 1st example) it could not according to the C. L. take effect in any way for it is a present estate to one not in esse (I am treating of grants and not of Executory Devises, of these in their proper place). 1st Inst. 298. 2 Roll 415.

Under a Devise to one not in esse for life with a freehold Remainder to B. the latter will take, tho not by remainder but by executory Devise. Such a limitation by deed cant take effect at all. Rowd. 414. 2 Wood. 179 note.

And if the particular Estate tho good in its creation, is defeated afterwards and before the remainder can vest in possession, the remainder must fail. Thus if an Estate for life is limited to A. with a condition, and the remainder over to B. and the condition is broken and the Grantor enters and defeats the particular Estate the remainder fails determines, no particular Estate remains to support it.

This rule however does not apply generally to vested remainders, but to those only which are contingent. For if an Estate is limited to A. for life and remainder to B. in fee and A. forfeits his Estate, tho' the remainder will take effect on the forfeiture. For the act of A. does not operate in favour of the Grantor, but in favour of the remainder man. The rule then of Justice Blackstone is too broad for it does not apply to vested remainders- 2 Bl. 167- 2 Wood. 180- 186- 187- Cro. C. 205- Fearne 209-234- 241 244- 261.

There is however one class of cases in which the rule holds as to vested remainders- For as the remainder depends upon the Livery of seizen made to the particular Tenant, if that livery of seizen is defeated by the Grantors Entry for breach of the condition the remainder tho vested fails, for the

Of Title to Things Real

By Purchase.

To Escheat, Occupancy, Prescription & Forfeiture See 2 Bl. 241. 295. As to Alienation by matter of record & by Special custom, 2 Bl. 344. 353.

1st. Of Purchase by Devise.

A Devise is a mode of alienation & may be defined A testamentary disposition of real property; or a disposition of real prop.y to take effect on the death of the owner. (Cou D. 13. 5 Bac 447.)

A will What? Lord. 1.2.

The right of devising existed among the Anglo Saxons; but was abolished on the introduction of the Feudal Law: it being inconsistent with the principles of feudal tenures. 2 Bl. 373. 57. Cou. D. 13.

The right was preserved however in some parts of Eng. by local customs, or by privileges granted by the Conqueror. (Cou. 3. 5. 2 Sch. & Lef. 154. 77. Bac. 59. 76. 1 Lev. 79. Sel. 237. 2 Bl. 374.) as in Kent &c.

(Terms for years & chattle interests generally were not affected in this particular, by the feudal system being personalty only. Cou 6. 2 Bl. 374. 2 Inst. 7. 2 Lev. 6. a term for years be created in Lands, de novo, at C.L.? (Cou M. 243. 1060, 78.

The suspension of this right continued for many

Conveyances from the Reign of Hen. 2. to the latter part of Hen 8. But the restriction was evaded by the doctrine of uses - a device of the use of land conveyed in trust to ecclesiastics. 2 Bl. 375. Pow 8. Plow 414.

This practice was checked by Stat. of uses 27th H. 8. which transferring the legal estate to the use, & thus consolidated them. Distinction between them destroyed by this Statute. 2 Bl. 375. Pow 613. 8. Co. Lit. 111. n. Pow. 236. Dyer 142a. 143b. 1 Rol. 616.

In the 32d year of Hen 8. a Stat. enacts that all persons having a sole Estate &c. in fee simple or in coparcenary or in common of manors, lands &c. should have power to dispose of 2/3. of those holden in chivalry, the whole of socage by devise.

This Stat. was explained by Stat. 34 Hen 8. The first of these is called the Stat. of Wills. 2 Bl. 375. Pow. 14c. 213. 218. And now all Engl. tenures, except Copyholds, being converted into socage by Stat. 12 Car. 2, all lands, except Copyholds are devisable. Pow 42. 10. 2 Bl. 375. 77.

Further regulations were made as to the mode of making devises, by the Stat. of frauds &c. 29 Car 2. (Pow. 9.) of which post.

Our Statute authorizing devises is similar to those of Hen 8. except that it extends the privilege further. Stat. 223. We have also a Stat. similar to Statute respecting devises in the Engl. Stat. of frauds &c. Stat. 287. infra. The constructions given to those Statutes are generally adopted here.

Vt.

Title to Things real by Purchase. of Devises.

The power of devising other dispens in Eng. on Stat. 32 Hen. 8. explained by Stat. 34 Hen. 8. The mode of devising is prescribed by the Stat. of Frauds &c. 29 Car 2. Pow 4. 3. 2 Bl. 376.

In Con. the power of devising is given by Stat. entitled "an act relating to the age, ability & capacity of persons. Stat c. 23. The mode or solemnity of the instrument, prescribed by "an act concerning witnesses to wills" Stat c. 25.

Of the Instrument; under the Stat. N. 8.

A Devise under the Stats. of N. 8. is an irregular instrument in writing" i.e. those Stats. having prescribed no form of words, any writing, manifesting an intention to make a testamentary disposition of Lands, & having the formalities required by Law will amount to a devise under them; provided such intention is not contrary to the established rules of Law. Doug. 377. 379. Pow. 14. 12. 13. 48. E.g. an instrument in the form of a deed, & the actually delivered as such. 1 Chy Cas. 248. Finch Ch. 195. 3 Keb. 310. 1 Mod. 117.

So a devise (or a will) may be written at diff. times; on diff. sheets of paper, which need not be joined together. (Pow 15. 106 &c. 108. 682. 3. 1 Show Eq. Contr. 174.) and 8 Chy all constitute but one devise, if so intended. 1 Burr 548. Pow 15. 16. Eg one by one instrument devises B. Acre to Day; by another W. acres, two years hence. (Pow 17 &c. 1 Show. 545. 553.

In the last E.g. of devise a testator at partial dispositions of part of his Estate, as he may do. Pow 17. 15.

In this case however the instrument must not be declared upon as his "last will" generally, but particularly, as that testator made his last will of such a part of his property. (Pow 18. 1 Show 549.

So also one may make several devises of diff. interests in the same Estate. E.g. Devise of Lands to testators youngest Son. this hims; afterwards same Lands are devised to testators wife for life, she pay'g such a rent to the Son. Both stand; as if made in one instrument. (Pow. 18. 19. Cro E. 721. 12 Vs. 187.) The last is, in effect, only a revocation pro tanto.

So a latter instrument may on the same principle modify a devise made in a former one; E.g. It may diminish the former, or annex conditions to it. Pow 19. 20. &c 2 Atk 268.

So a devise may under these Stats. by a reference in a devise to another instrument (as a Deed) make that for the purpose of explaining the intention, a part of the devise. E.g. I devise to J.S. all the rents expressed in a certain deed. So of a direction by testator to Exors to dispose a certain sum as he should by deed appoint, & he makes & appointment. Pow 22. 3. Ry 117. 2 Atk 273. 10. Vs 530. (vide Pow 48. 1. 3 Vs. fo. 228. Cuyc

So after a will or devise is made & published, testator may make a Codicil or Codicils, explaining altering, restraining or enlarging the dispositions before made. Pow 24. The Law annexes the Codicil to the devise & considers both as one instrument. Pow 23. 543.

Title to things real by Purchase. Of Devises

2 Roll. 242. 1 Ro. 57.) By a codicil is meant an addendum to a will or devise explaining &c as at supra. Pow. 23. 24.

But a mere recital in a devise of something contained in another instrument, is not itself a devise. 2 Vent 56. 7 Rha. 427. Com. 232.

In the construction of the Statute of Wills it was holden that every devise of lands &c must be entirely in writing. Pow. 26. Plow. 345. But the Judges took the word writing in its most extensive & vague sense; as including books, notes, memoranda, & even letters expressing owners intention. Pow. 25. 6. 2 Bl. 376. Mo. 177. Dy. 72. Cro. E. 100.

Indeed it was holden unnecessary that the writing shd be made or authorized by the Devisor. A devise written by an attorney, in pursuance of instructions by Devisor, but in his absence & not communicated to him, was good. Pow. 26. Dyer 72.

So it was holden that if one, in extremis, had declared his intention to devise by parol, & another without any direction or authority had reduced it to writing in the owners life time, it wd be a good devise. Pow 26. 1 Leon. 79. 3 Le. 113.

But this two last opinions were soon overruled. Pow 26-8. Cro E. 100. Dy. 72. 2 Rib. 345. 1 Leon. 113.

And it was holden that the devise must be completely reduced to writing, during devisors life-else void - e.g. If a devise was to be made to J.S. this being upon cond. & before the cond. was written devisor died, it was all void. Pow. 28. 9. Dy. 72. 3 Co. 81. b. 1 Thin. 72.

But when devisor directs formal distinct

devises, & after one was compleated, but before the other was written dyed. the same was adjudged good. Pow 29. 3 to 31.

So it was holden, that a devise might be good in part & void in part, E.g. Seizure annexed a condition to the devise without authority. cond. void. devise good. (Pow 30. Dyer 72. n. 2.) Secus, where the direction was to devise on cond. & the devise written without cond. (Pow 30. 1 Rol. 880. Mo. 356.) Here the devise is not written in testators life time.

Signing by Devisor holden unnecessary under these Stat's. not necessary that his name shd appear on the instrument. (Pow 30-1. 1 Sid. 362. 2 Leon. 35. 3 K. 79.

Indeed it was holden, that any writing, tho neither signed, seal'd, nor written by devisor, was sufft. and that the evidence of one witness was sufficient to establish it. (Pow 31. & 2 Rol. 128. 1 Sid. 315.) A decision to this effect, probably occasioned the clause relating to devises in the Stat. of frauds.

Of Interests & Estates not Devisable.

Formerly holden that contingent interests, resting merely in possibility cd not be devised under y. Stat. of Wills. Pow 34. 3 Leon. 427. Fearne 291.

Now clearly settled that they may be; i.e. y. possibilities coupled with an interest are devisable before the interest vests. Secus of naked possibilities. (Pow 34. 234. 447. 600. 1 Bl R. 222. 1 H. Bl. 30. 1 Fonbl. 293. 9. Fearne 441-4. 3 T. R. 88. 90. 4 T. R. 248.

But an estate which is limited to a man upon his

not within the purview of the Stats. of Wm. 3. - as a reversion discontinued. e.g. Tenant in Tail & the Reversion join in a Lease for Life - Reversioner cannot devise y^e reversion - it is discontinued. Pow 35. 36. Cro C. 281. 293 or 387. 405 vid. 2 Bl. 198. 9.

An estate pur autre vie is not devisable under Stats. Wm. 3. - For they are confined to persons having Land &c. in fee simple. Plow^d 218. 36. 7. 8. 1 Roll. 334. Cro E. 58. Co. Lit. 41. 2 Roll. 150. Palm. 32. So of an estate for several lives. Pow 37. 3 Rob. 450. 1 Vern. 428.

&c of a base fee, or Junior descendible pur autre vie. e.g. tenant in tail grants to A. & his heirs. A cannot devise his interest. Pow 36. Carter 208. 311. Poph. 91. 2. Dy. 253.

But now by Stat. 29. Car. 2. Estates pur autre vie are devisable. (Pow 37. 8. 2 Bl. 259 &c.) unless there is a Special occupant

Our Stat. it seems authorizes devises pur autre vie. The words are "shall have power &c to make their wills &c of their Lands & other Estates", which seems to include all Estates, which may continue after the owners death, & to which no other person has a claim (but the owner) & not defeat by his own act. It does not then include estates in Tail. vid. 28 H. 8. Stat.

Indeed by the 2^d Section of our Stat it seems y^t one may devise any interest remaining after his death which he might have transferred by Deed in his lifetime. Stat C 24. & 8. Wm. & M.

Dignities, offices & franchises, tho they are of a

descendible in Engd are not devisable - not within
the Stat. of H 8. (Pow 40.1. 3 Co 32 b) 10 Co 81. In Corp. offi-
ces are strictly personal, except that in some cases
they may be exercised by Deputy - not devisable, nor
descendible.

Copyhold Estates, not devisable in Engd - there
must be a Surrender to the use of the will - not with-
in the Stat. H 8. (Pow 40. 45.6 Woods Inst. 135.

A right of re-entry on lands depending on
the non performance of a condn by grantee is not de-
visable. For he has not the land till breach of the
condn no Estate in the land strictly speaking. Pow 46
183. 1 Ves. 223. 422. H. L. 316.

Of the Devise itself (i.e. the Instrument,) & of the sub-ject-matter of devises within the Engl Stat. of Frauds, & our own Stat. (p. 257.)

The clause relating to this subject in the Engl
Stat. of Frauds &c enacts "that all devises of Lands &c
"shall be in writing, & signed by the party devising, or
"by some other person in his presence & by his express
"direction, & subscribed in his presence by three or
"more credible witnesses." (Pow 47.8. 2 Bl. 376.

Our Stat. enacts that "no wills &c whereby there
"shall be any devise of real Estate, shall be held good &c
"if they are not witnessed by three witnesses at the
signing in the presence of the testator. Stat. c. 257.

Substantially the same with the Engl, except that
there is no express provision made with respect to the time

signing. Same rule however, adopted by our Courts, (I suppose) as to Testaments by signing.

The object of these provisions is to guard men in Extremis against fraud, & to protect minors at Law. Pow 47.

"All Devises" &c. No form being prescribed, any more than in the Stats. of H.8., any writing which would have been good as a Devise under the Stats. of H.8 will now be valid, if the solemnities prescribed by the Stat. of Frauds are observed, i.e. if signed & witnessed as the latter Stat. requires. Pow 48. a.

Hence (as under the Stats. of H.8.) a devise executed according to the Stat. may, by reference to another instrument make the latter a part of itself, tho' instrument referred to, is not thus executed. e.g. A by devise duly executed under this Stat. charges his land with his Legacies; & then by another instrument not thus executed gives Legacies these Legacies will charge the Lands. Pow 19. 480. 2 Atk. 368. 1 P. Wms 423. 2 Atk. 254. 3 Burr. 1775.

"Of any Lands or Tenements". Descriptive of the subject matter of the enacting part. (Pow 52.) Words in our Stat. "Lands & other Estates." St. 6. 23) & "real Estate" Stat. 25.)

Decided that the Stat. does not extend to our Engh. Colonies as were Plantis before the Stat. passed. Pow. 52. 2 P. Wms 75. Cowp 204. Sal. 411. (vide "Municipal Law" page)

Wd a Devise made in a foreign Country of Lands

lying here, must be executed according to our Statute.
Pow. 52. 3. 2 P. Wms. 291.

Secus, in case of personal prop^y. - it has no local
ity. 1 Ves. 31. 69. 1 Amb. 25.

These words do not extend to Copyhold Lands. Pow
53. Cro C. 44. 2 Bl. 1114. 2 Vern 498.

These words do not extend to a bequest of a Chattel
interest. Pow. 55. Gilb. R. Eq. 169. 170.

A Trust of an Inheritance is within y^e Stat of
cannot be devised, but by an instrument made accordg
to it. Pow 57. 3 Atk. 152. 2 P. Wms 258.

An appointment of Land under a power, if made
by will, must be executed according to the Stat. of frauds.
E.g. An estate is conveyed to trustees to such uses as A.
shall by will appoint. (Pow 48. 9. 58. 150. 1 P. Wms 740.
2 P. Wms 258. 2 Ves. 172.) - By "will" is meant such a will
as is proper for disposing of Land. (R. L. 316.) Mistake
the same. -

General rule, that a writing, intending to be a
will, if void as such, cannot operate as an appoint
ment. - Secus the mischiefs to be prevented by y^e Stat
w^d ensue. Pow 58. 9. 2 Vern. 59.

And if a Legacy is given originally out of
Land, the will creating y^e charge, must be executed
according to the Stat. Such a charge is in effect a
disposition of part of the Land by devise. (Pow 59.
2 Atk 268. 285.) Different from the case of an estate
power to in a devisee. (last page)

Rents arising out of Land are within y^e proviso of y^e Stat.
(Pow 59.

Of Devises.

So a Will giving a power to Exors to sell Lands, must be Executed according to the Stat. 29 Car. 2 c. 3. For this is indirectly disposing of Lands, i.e. enabling others to do it.

The Engl. Stat. of Frauds extends to all Lands & Tenements devised either by the Stats. of Wills only itself. (& Stat. of Frauds) or by any Custom. Cou. 59. 60.

Of the solemnities required in Devises by the Engl. Stat. of Frauds.

First. The Devise must be "in writing". This requisite is indeed contained under the Stats. of Wills (Cou. 60, 28. 6. Cou. 340.) It is also necessary under our Stats. the Ch. word "writing" is not used, Stats. c. 23. 25. 1 Ves. 326. But by provision as to witnesses implies that it must be written.

This rule needs no illustration further than has been already given as to the instrument (ante. pp.)

Sealing, tho usual is not necessary. Cowp. 264. 2 Vez. 70.

Secondly. "Signed by Testator, or by some other person "in his presence & by his express direction". Cou 47, 8. 60.

Signing not expressly required by our Stat. Stat c. 23. 25. But in the construction of our Stat. the rule of the Engl. Stat. as to signing is pursued. 1 Ves. 326. Of course. our Law under this head is the same as the Engl.

Sealing is usual in Com. but not necessary either in Law or in Engl. Sealing in case of deeds is a fraud so currently - mark of distinction between families. Cou. 61. 76. Gilb. Ten. 24. 281. 1 Ves. 326.

Signing what? It has been holden that sealing

alone amounts to signing within the Stat. (Pow. 62. 3 Lev. 1, 3 Mod. 219. Ct. divided 3 to one. Same point hol- den by Lord Raym.^d 2 Show. 764, Pow. 66, 7.) Holden contra: 25 Geo. 2. (Cow.^s 7[4] Ves. 313.) the latter seems the better opinion, the former facilitates the forging of devises.

But the name of the testator, written by himself, in any part of the instrument is construed a signing, unless it appears that it was not so intended. E.g. "I, A. B. make," &c. (Pow. 61. 5. 3 Lev. 1. 3. Mod. 219, 1 Eq. Cab. 403.

But if it appears, that the name written in the body of the instrument was not intended as a signing, it will not operate as such: as if there was an express intention to sign formally, & the intention was defeated. E.g. the devise being in 5 sheets, testator signed y^e 2 first, & attempted to sign the others, but failed. Doug. 241. n 226. Pow 65. 66., 1 Fonbl. 180.

The onus probandi in this case lies upon him, who opposes y^e devise. The presumption of law (y^e intent to devise being certain) is that the name written at sup. in y^e body of y^e instrument was intended to be a signing. Pow. 65. 6. –

Devise subscribed by 3 witnesses & declared by tes- tator in their presence, to be his will, tho not signed by him – holden well executed. 1 Ves. Jr. 11. Dev.

"Attested & subscribed (in his presence) by 3 or more credible witnesses": the general object of this clause is to prevent the frauds consequent upon the secret execution of Devises. Pow 68. ("Credible") 1 Bur. 417, Pow. 113. 116. Pow.

The attesting witnesses are to attend to three objects:

Of Devises.

1. The Sanity of testator. Pow 68. 2. The fact of his signing, 76. 69. 77. 3. The fact of publication. 76. 80.)

1st They are to judge of his sanity or state of mind. For the signing which they are to attest, includes in Law not only the physical act of writing testators name, but also the mental power or capacity of making legal & effectual signature. - An idiot may write his name. Pow 69 & 71. 3 P. Wms 93. 8 Vin. 169. 13.

And when the devise is objected for probate, testators sanity must be proved - ones or devisee. - proving the execution to have been formal, not suffic. Pow 69, 70. 2 Atk. 56. Bull. 264. 1 Bac. Ab. 365.

Hence the Ct. of Eccly will not establish a devise, unless all the attesting witnesses are examined. For if one has a right to require proof of testators sanity from each of them. Pow 70. 3 P. Wms 93. As to proving it in evidence at the close of this title page.

But the testimony of the subscribing witnesses is not conclusive, as to testators sanity or signing, even as to their own subscriptions. Bull 264. Str. 1096. (Ross)

2nd They are to attest the fact of testators signing: Not necessary, however that the witnesses shd have actually seen testator sign, or acknowledgment by him to them, that his name appearing upon the instrument was written by himself is suffic. as to this point. Pow 71. 8. 3 Lev. 1. Pre Eccly 184. 2 P. Wms 506. 2 Ves. 455. 3 P. Wms 253. Doug 232. or 244 n.

But testators saying "this is my will", is not suffic. evidence of the fact of signing & semb. - nor a

acknowledgement of that fact. Pow. 73. Dr. 2. 48th. 182.

It seems however, that a written declaration of the name under of the Devisor, that his name was written by himself, is sufft. evidence to a jury of the fact of signing - an implied acknowledgmt. Pow. 76. 78. Shiv. v. 22 y. Com. St. 15 y. e.g. "signed &c. as my last will." &c. Yet dr. Pw. v. hither. an actual acknowledgmt. is not necessary. Pow. 80. 3 P. W. 254.

3dly. They are to attest the publication.

As publication was necessary before the Stat. of Frauds, & is not taken away by it, it is still holden necessary. Pow. 80. 1. 3 Atk. 156. - analogous to the ceremony of delivering a Deed. Pow. 86. 7.

By the publication of a will is meant some act by testator amounting to a declaration that the instrument is his will. Pow. 81. No form of publication necessary. Ib.

Any act or declaration impending a solemnisement in testator to dispose of his estate by the instrument is sufft. Pow. 81. 8 Vin. 125.

Hence delivering the instrument as a Deed has been holden a sufft. publication (Pow. 81. 8 Vin. 125. 13.) So holden in a case where the witnesses were deceived & supposed the instrument to be a Deed. Pow. 81. 2. 4. 3 Atk. 8. 2. 11.

So declaring to the Witnesses "This is my last will." is sufft. Pow. 82. Swinb. 52.

So, publication may be inferred. e.g. where the form of the attestation, seen in the testators writing, is in these words "signed, sealed, published & declared &c. in presence of us" - & he says to them "take notice - it was holden

a sufficient publication. Fow 32. 6, 4 Burr. Ec. 2. 114.

But the publication must be in the presence of the witnesses (com 6.) - at least this is holden necessary as to publications. Fow 604. Com: C. 381.

Nor can that the whole will be present at the time of attestation - If it is in several parts, or of which the testator by witnesses, who never saw the others, it is not executed. Fow. 87. 3. Mod 263. 1 Eq. Ca. ab. 403.

But unless there is positive proof, that the whole was not present the Jury may, from the circumstances of the case presume that it was present, & it is a fact for their consideration. Fow 87. 3. Burr. 1771. 3. 1 Ves. C. 40, 422. 450.

As to the subscription of the witnesses:- Holden, that if a devise is made on three sheets of paper not joined, & each witness subscribes the sheet the subscription is sufficient. Fow. 89. 90. 101. 108. 682. 3 Burr. 1771. 2 Ves. 3, 7. 1 Burr. 348. Prec. Ch. 486. 2 Ch. Ca. 185. 270. Carth. 89. 3 Mod: 253.

So if the loose sheets in the last case were wrapped up in a blank cover, their subscription upon that it is said will be sufft. Fow 90. 682, 3.

"In the presence of the Testator". These words holden synonymous with the words "within the view", for if they subscribe within his view, the subscription is good. Fow 906. 2 Ves. 377. By the latter word "view" is meant possible view: For if testator might have seen the witness subscribe, the subscription is on his presence. Fow 90. Cal. 395. 688. Carth. 81. 1 Eq. Ca. ab. 403.: E.g. where he might have seen into a gallery thro a glass door.

So if the curtains of his bed are closed, yet a sub-
scr.

subscription in the same room, it is said is suff^t. (Pow 92, Sal 395.) Because it is in his power to see them.

Not necess^y. that testator & witness sh^d. be in same house. e.g. she in her carriage, they in y^e atty y^s office. Pow 92. 1 Bro Ch^y 99.

But the subscription, tho in in a contiguous apartment is not good, unless testator might have seen it. Pow 92. 4. Carth 79. Comb. 156. Pow 89. Hob. 222. 1 P. W^ms 239.

Tho the witnesses retire to subscribe at testators request, ye above rules apply. (Pow 94. 5. 2 Show 288.) For this clause, it seems, is intended to prevent not only fraud, but any mistake, as to the identity of the instrum^t. 2 Sal. 377 Pow 98. Doug. 232.

If then testator is insensible at the time of at-testation, tho corporally present, the attestation is not good. This "presence" implies in construction, a mental presence also & a knowledge of the transact^n. (Pow 96. Doug 229. n 241.

So tho the attestation is in the same room with testator, & he of disposing mind; yet if executed clandestinely, not suff^t. — not in his presence within the meaning of the Stat. — ignorant of the transaction. Pow 95. 1 P. W^ms 740.

Tho the witnesses must subscribe in testators presence, yet the fact that the subscription was in his presence need not appear on the face of the instrum^t. — It is a fact for the consideration of the jury. If not stated in the instrum^t. it must be proved. Pow 95. 9 Com 381.

not

Bull. 264. Stra. 1109. 8 Vin. 128. - If the witnesses are dead, the Jury may presume the fact.

"By three or more (credible witnesses.)

Under these words it has been decided, that if a devise is subscribed by A. & B. and afterwards a codicil by B. & C. the devise is not signed by three witnesses within the Stat. (Pow 100. 110. 680. 2. Ewell 35. 8. 6. Holt 742. 8. C. Comb 174. 3 Mod 262. 1 Show 68. Pr Chy 270.) and that if the devise is not witnessed; a codicil with 3 witnesses will not make it good. 2 Vern 597. Pow 680. 2. Qu. as to the principle - It does not appear, except in one case (Com C 384. Pow 104. 5.) that the devisee was present when the Codicil was executed. (7 T. R. 140) - the decisions however, appear clearly to have proceeded upon the distinction between a Devise & Codicil, & devises made at several times & in several distinct parts. (Pow 686. 103. 104. 1 Bur. 554. 5.) in which last case an attestation of one part is sufficient - what is the difference? for the will and codicil constitute but one instrument (Pow 23. 543.) A codicil (I suppose) is considered as being intended to affect an instrument already completed. not to consummate the instrument or to give it validity - attestation of the codicil, ergo not effectual as to the original devise. (Pow 680. 2. Pr Chy 270. 2 Vern 597.) But an attestation of one part of the original devise is intended to give authenticity to the whole.

(But when there is a will & codicil on one piece of paper? Qu. whether the subscription of the witnesses to one or both is a fact to be determined by the Jury. Pow. 106 & Com. 1st

Of Wills.

As to the Doc. whether a subsequt. writing is a codicil, or a distinct part of the original devise, it seems yt. if yt. subsequt. part relates to personalty only, it is excluded according to yt Stat. this circumstance furnishes presumptive evidence that it was not intended as a codicil. Pow 109. 1 Bur. 554-5.

Nor necessy. yt the witnesses subscribe in each others presence, or at the same time. Pow 110. 3. 2 Chy. Ca. 109. 3 Bur 1773. 2 Vern 429. Pre Chy 184. 2 Atk 177.

But it is most safe: for the oath of one witness is sufft. to prove, that all signed in testators presence; but unless all were present together, proof cannot be thus made (Bull 264. Pow 708. 1 P. Wms 741. 1 Forbl. 184. 1 Bl. R. 365. 4 Bur 2224) And if one is living, the hand writing of the others cannot be proved. (Pow. 709.) in such case, proof that the others signed in testators presence cannot be had, unless all were together (Pow. 113. 720.) — (Note the difference between proving the execution & allestation of the devise in a particular suit at Law, which seemb may be done by one witness. (Pow. 708. 1 P. Wms 741.) — & the establishmt. or formal probate of it in Chy, for which purpose all must be examined. Pow 70. 718. 1 Wils 216. 2 Ves. 171. —

Credible witnesses" ("credible" not in our Stat.)

1. Who are such? The word "credible" seems to be an useless one — the credibility of the witness never enquired into (1 Bur. 417.) If it means competent, it is unnecessy. — competency implied in the word witness. (Bur. 417. 8 Pow 133.

Decided that a devisee is not such a witness as yt Stat.

requires — clearly so, as to his own devise. One who is no witness, cannot be a credible witness. (Pow 114. 116. Atkins vs Jennings, Com R. 91. Carth 514. 2d Ray. 505. 12 Mod 277. 1 Show 510.) — Interested. (Stra 1253.) — the rule extends to interested witnesses generally — (As to a good witness as to the other devises in the same instrument? Post.)

No doubt but persons rendered incompetent by crime cannot give evidence of their subscription (Pow 116. 136. — 4 Burn E. L. 93.) as where before attestation witness was convicted of larceny.

2d Can a subscribing witness, who is a devisee, or otherwise interested at the time of attestation be rendered competent by any thing Ex post facto (as by a release) so as to establish the devise? — In other words, if the witness, the interested at the time of attestation is competent to testify at the time of examination, can the devise be established? (Pow 113.) — is it well attested?

Norden, obiter, by Lee Ch. J. in Ansley vs Dowsing that the witnesses ~~may~~ must be competent at the time of attestation. (Stra. 1253. Pow 116 119.) — The witness' wife had an annuity charged on lands not released — interest subsisting, as in Holland v. Jennings. This case was carried to the Exchequer Chamber; difference of opinion, case compromized. Pow 120. 12 Vin. 503.

The Devise was directly decided in favour of devise under such circumstances in Wyndham v. Chetwynd. (1 Burr. 414 Cr. Pow. 124.) The witnesses were all creditors; the debt charged on land — paid before the time of examination — devise to them duly attested. — Same opinion expressed by

by Ld. Hardw. in Price v. Lloyd. 1 Ves 503. 2 W 374. Pow. 125.

Case of Ld. Aylesbury's will in point to the same purpose (cited 1 Bur. 427.8. Pow. 135.6.) The witnesses all had Legacies charged on land by 2 wills — Indifferent to them, at testators death (not before) which was established. — Previous bias

Same point decided in Hindson v. Kersey. Pow 130. 132. Pratt Ch. J. contra

Powells statement of y^e auth's. p. 133.

Wadsworth v. Camp decided in favor of the devise by Supr. Ct. Reversd. by Ct. of Errors 1799.

3^d. It is questionable indeed, whether the devise to the witness is not void ab initio, so that he might testify as to the others, without a release. (1 Bur. 428. 1 P. W. 557.8. Carth. 514) — not positively settled. Stra 1253. — Decided contra in Wadsworth v. Camp.

The Stat. 25 Geo. 2. (being declaratory) is an auth'y. in support of the opinion, that the devise to a witness is ab initio void, & therefore he is a competent witness. (Pow 122.) That it is declaratory vid. Pow 129. 133. 5 Bac. 516. — But see Pow 133.4.

That Stat. provides that devises & legacies to attesting witnesses shall be void, & they admitted to testify — and that Creditors, whose debts are charged on testators lands & who are witnesses shall be admitted as witnesses, notwithstanding. Pow. 122.3. — No such Stat. here.

General principle of C. L. that a release

by an interested witness, restores him to competency. (L^d. Ray. 730. Pow. 121. Doug. 134.) Objection - temptation to perjury at the time of attestation - What then? Same objection in every case at C. L. Stat. of Frauds intended to regulate rules of evidence in Ct.

Objection: Practice furnishes bribes. - (So in every case.)

Objection: Idiots, lunatics, infants. (They c^d. not judge of the execution. - Suppose same case at C. L.

Objection: "Three Englishmen" required. (1. Qualification is intelligible as referring to attestation. 2. But "competent witnesses" is not.)

But a Legatee (or devisee) is a good witness as to will. - As to his interest. Pow. 135. Vol. 691.

An Exor having no beneficial interest under the devise is a good witness to prove testators sanity. Doug. 134. 3 Ves. 489.

So a Legatee, who is a subscribing witness, is competent if it is indifferent to him, whether the will stands or not. E.g. if he has the same legacy by two wills, to one of which he is a witness. Pow. 135. 1 Bur. 427.

It seems that a testamentary disposition of real and personal property, may be good as to the latter, tho void as to the former. (Pow. 118. Stra. 1255.) for want of due attestation. Carth. 319. 4 Mod. 208. 3 Ves. 319. 327. 332. 337.

(Mo.)

Who may Devise.

The Engl. rule is, that all persons who may convey & who are not disqualified at C.L. or by the express words of the Statutes of wills may devise. Pow 130.

But by the words "all Persons" in the Stat. 32 H.8. are meant natural persons, as distinguished from civil or bodies corporate. Corporations cannot devise under this Stat. Pow 139. Roc. 608. 3 Com 14.

As to natural persons there are 4 positive disqualifications in the Stat. 32 H.8. as explained by 34 H.8 viz. Coverture, infancy, idiocy, & non-sane-memory. Pow. 140.2. Dyer 354.b. 1 Roll 300. All C.L. disabilities

According to the construction of the Stat. 32 H.8. then, those persons who before 1st Stat. Ed. VI. could not devise lands during their lives cannot under that Stat. devise them. Pow 141.) See 1st rule supra.

In certain parts of Engl. infants may devise by custom. Pow 143.4. Park. 221

Full age is completed on the day preceding 21st anniversary of one's birth. Stat. 44. 625. 2 Kay 480 = 10 H. Pow 144. 686. 1 Bl. 142. Kay 84. "Parent & Child." 1 Bl. 459. Post.

2. An idiot is one who has no understanding from his nativity - a natural fool. 10 C. 305. Pow 144. Dy. 143.b. 203.b

A person is not an idiot if he has any "glimmering of reason" - as if he can tell his age, count 20 &c. Pow 145. F. N. B. 233.

A person deaf, dumb & blind cannot devise -

dumb an idiot, as wanting those senses which furnish the mind with ideas. Pow. 145. Co. d. 42. 1. Bl. C. 304.

3. A person of non-sane-memory (tho not an idiot) cannot devise. Pow. 145. b. Cro. J. 497. Dy. 148. b.) By these words is meant insanity, a mental derangement in general.

Not suffic. that testator can remember common events. He must have, what is called, a disposing memory. i.e. understanding suffic. to make a reasonable disposition of his property. Pow. 146. Co. 26. Dy. 72. Mo. 760.

What is a sane & disposing memory? - a Qu. to be determined by gen. rules of L. C. L. (Pow 146. b Co 23 b.)

4. A feme covert cannot devise in Engd. - tho' actly supposed to be done by her coercion. She wants free will. Pow 146. 4 Co 61. 7 Co. 225. Co. d. 112 b. Dy. 354 34. Swin 688. Coid. "Hus. & wife", & hereby disabled by Stat H 8. (Pow 140. 2.

And it has been holden that a Custom for a feme covert to devise was not good. - "unreasonable" coercion. - Pow. 147. 8. vid. 3. Com. D. 14.

Decided in Com. that a feme Covert may devise real propty. even to her hus. - Kellogg v. Adams Ct. of E. 1786. Supr. Ct. decided contra. (Kirb. 195. 438.) - For she may at C. L. devise what is devisable; except so far as the hus rights will be violated by the disposition. Qu. 2 East. 552; E.g. Propty. to her sole & separate use if not real. Bro 518. 3 Bro. 303. 2 Bro. 75. 1 Bro Ch. 10. 3. Atk 695, 709. Pr. Ch 204. 1 Vern. 126, 4 Co. 2 Ab. 82. 316.

Objection. She cannot bequeath personalty without hus. consent. Park S. 502. 2 Bl. C. 498. Plow. 891.

Of Devises.

This rule relates, it seems, to personal prop^y. belonging to the hus^d. by marriage, (Bracton 60.) or wh. he has a right to contract. (2 Ves. 2 East 552. 1 Rawe 76. 2. 111. 307. 4 Ves. 72. 10. "Because it w^d. be a trifle of his goods" (cits Bracton). 1 Rawe 76. 2. 307. 4 Ves. 73. 111. is to prop. to this purpose.) So of her paraphernalia anciently. (1 Ves. 307.) &c, according to some, of her paraphernalia 2 Ves. 1 Ves 307. 5 Bac 498.

So she may appoint an Ex^or of goods & chattels which she holds as Ex^or, without his consent 2 East 552.) can not bequeath them indeed even with his consent, for they are not devisable. 5 Bac 498. 2 Ves. 49. Plow^d 526. No. 340. 1 Rol 908. 912.

But even here she cannot deprive hus^d. of curtesy where he is entitled to it. See Judge Rawle's essay. The decision by the Ct. of E. was approved by the Legislature on petition for new trial. Decided contra in Fitz & Brainard Ct. of E. 1805.

(But if hus^d. is banished for life, wife may make a will (or devise I suppose) for she is as a feme sole, & "may in all things" act as such. Pow. 148. 149. 2 Vern. 104. 2 Bac 49.

And in Eng^d. there are ways in which a feme covert may retain or procure y^e same power over her Estate real, as well as personal, as is possessed by feme sole — i.e. the power of alienating or devising. Pow. 149.

This may be done by either of two modes or elements. 1 By way of trust. 2 By way of power over a use.

(Pow. 150. 2 T.R. 695.) Such settlement may be made before or after marriage. If after, however, it must be by fine or recovery. Pow. 147. ("Mus. d. wife".)

And it seems, that now a bare agreement for either of these purposes, will be suffic. tho the settlement is not actually made. 2 T.R. 695. 6 Bro P.C. 156. 2 Ves 191. Pow. 166. 168. i.e. the heir will be compelled in Eq. to make a conveyance in pursuance of her appointment. - Eq. considers as done, that which is agreed to be done.

1. By way of Trust: as if a woman having real estate, convey it before marriage or by fine & recovery afterwards, to trustees in trust for herself, for her separate use, during Coverture, & afterwards in trust for such persons as she shall by any writing &c. appoint. A devise by her will be a good declaration of the trust & supported in Equity - not called a devise but a writing in nature of a devise. Pow 162. 2 Ves. 612.

2. By way of power over a use, as if a woman conveys real estate (ut supra) to the use of herself for life, remainder to the use of such persons as she shall by any writing &c. appoint. A devise making the appointment supported in Chy. (Pow 150. 2 T.R. 695. 2 Ves. 64. 612. 3 Bro P.C. 308. 4 Vin. 168. 3 Atk 707. 2 Eq. C. ab. 157. 753. Powel on Powers 50.) So now supported in Cts of Law. (2 T.R. 695. Pow 162.) i.e. devises under a power of uses; not so, I suppose, in case of trusts supra. Uses are now legal estates. —

Every power thus executed, takes effect as if the limitation in the instrument of appointment had been

contained in the original Conveyance or Deed creating the power. - The disposition is considered as taking place when the power is created; tho the nomination of appointee does not take place, till the execution of the power. The deed of Settlement is considered as the deed of alienation. Pow. 163. 4. 168. Co Litt. 111. 112.

The appointment by devise in these cases must be executed according to the Statute of Frauds. Pow 48. 9. 58. 150.

But if the feme covert is an infant, she cannot thus execute a power over her Estate. - Discretion wanted. Pow. 108. 9. 3 Atk 89; Ves 298. - So of infants generally. Powell on Powers 43. 47. 3 Bac. 138. n. Ves 298. 304. Co L. 52.a 3 Atk 695. 710. 714. 715. "Parent & Child."

Restraint, duress & menace of imprisonment are disqualifications - these are such at C.L. - Not expressly pointed out in Stat. 34 H. 8. tho implied from the words, at his "free-will & pleasure." Pow 170. Dy. 143 b. Hay. 334. Dy. 427.

Same rule doubtless in Eq. - for freedom of will, which is essential in the making of every contract is wanting. 1 Bl. C. 131. 8 Co 119. Pow C. 163.

So, hotten, that if a sick man is induced by importune importunity to make a will, that he may obtain quiet, it is by restraint. Pow 170. Dy. 427. 16 Dy R. 06. / Dr. Com. Dig. "Devise", H. 1.

But there must be actual proof of undue importunity or restraint. Pow. 175. 2. Rep. Ch. 125.

If either of the above disabilities exists at the inception of the devise, i.e. at its execution & publication

it will be void, tho the disability be removed before its consummation by testators death - for the consummation is founded on the inception which is void. E.g. coverture, infancy &c. Pow. 172.3. Dy. 143.6 Hobt. 246. 11 Mod. 157. Ley 84. 1 Vid. 162. Com 6. 84. Plow. 343. Sel. 238.

A joint tenant cannot devise in Engd. This is the rule as to devises by custom, before the Stats. of Wills. For the survivor claims the whole by a title paramount the claims by death of his companion; - the devisee after the death, "per & post", Co. 174.5. Litt S. 287. Co Litt. 185.a Park S. 500; and there cannot be a joint devise. Comp 269.

Same rule under Stats. of Wills. - not expressly disqualified by these Statutes, but tacitly by 34 of H. which expressly empowers persons seized in fee simple, coparcenary & in common - "expressio unius" &c. Pow 12. 176. 6. 218. 1 Eq. C. ab. 172. 8.

So, if a joint tenant makes a devise of his part, & survives his companion & dies, it is not good ab initio - He had nothing then, to devise. (Pow. 176. 178. 10 Bl. R. 476. 3 Burr. 1488. Poph. 87. 3 Co. 31. Formerly doubted. (Pow. 176. 1 Eq. C. ab. 172. Park S. 500.)

In C. one Jt tenant may devise - no survivorship words of the Stat. genl. -

General rule: A man cannot devise lands which he has not, or is not seized of at the inception of the devise. i.e. the time of its execution & publication. This index is the C. L. rule as applicable to devises by custom. Pow 183. 198. 2 Bac 51. Co Litt 111. Cro E. 401. Pow. 191. Sal. 237. Hobt 246. 749. 750.)

E.g. Testator devises all his Lands & afterwards purchases more. Latter do not pass. Devise is in nature of a conveyance in praesenti to take effect in future Pow 191.3. The owner must have a present interest. (Some opinions contra Pow 185.) Livery dispensed with from necessity. Pow 195. 185.

Secus, as to an after purchased Lease for years. This is only a Chattel. (Pow. 189. 1 P. Wms 575. 3 Ch. 189. Sal 237.) For a Will of personalty is not considered at C. L. as a gift of a specific thing, but as the appointment of an heir, (Pow. 187.) to his pers.l Estate.

So in Devises by Custom, it is necessary that y. devisor d.d die seized. for the conveyance is not consummate till testators death - ergo. if y. owner of Land, after devising it, is disseized & continues so till his death, y. devise is void Pow. 184. b. 566. 611. Holt. 748. 1 Rol. 616. - Secus, of a disseisin by fraud and covin. good in Eq. Pow 611. 1 Rol. 378. 1 Eq. C. ab. 174.

Same rules obtain under the Stat. of 76. 8th Pow 183. 198. 201. 2. 2 Bac 52. 1 Mod 217. Holt 251. 2. 243. Plow.d 341. Pow 194.

But if the owner, being disseized after y. devise, re entres & dies seized, y. devise is good - for he is consid.d as having been seized continually. 2 Bac 52. Sal. 238. Pow. 185. b. 611. 11 Co. 51. a. b. Holt 748. Palm. 205.

So, if the owner is disseized at the time of a raising his devise but afterwards enters & continues seized till his death, y. devise is good. For he is supposed to have been seized ab initio. he is seized by relation - action for

for mesne profits. Pow. 185.6. 2 Bac 52. Sal. 238.

It has been much doubted, whether a devise of lands not owned at the time by devisor but specifically described & afterwards purchased is good. Decided not to be. Contrary opinions. Within the same reason as if not so described. Pow. 200. 2. Plow. 344. Holt 251. 3. 243. 2 Ray. 438. Sal. 237. 3 Bac. 1457. 7 T.R. 406. 414 arg.

Upon the same principle, a devise by mortgagor of the lands mortg. will not pass the Eq. of Red. afterwards purchased by him. Pow. 202. 3 Chy Rep.

In Com. seisin by devisor is not necessary. Ownership suff. "Having" or seized not used in our Stat. So in descents by our Law. Right of poss. equivalent, here, for most purposes, to actual possession.

And, in Eng. a person having an Equitable Estate in Lands, (ie. a claim to them in Eq.) may in Eq. devise the lands themselves. E.g. Executory agreement by A. to sell land to B. - Before conveyance B devises them & dies - good in Eq. - Eq. considers as done &c. (Pow 203. 5. 7. &c. 2 Chy Cas. 144. 9 Mod 78. Pre Chy. 320. 2 Vern 79. 2 P. Wms. 631. 1 Ves. 437. 494.) Vendor is a trustee in Eq. for vendee, & on a bill by Cestui q. Ct. will decree a specific performance. Pow. 208.

This is not treated as a devise of a future Estate - The land belongs to vendee, from the agreement in Equity.

But q. land will not pass by a devise executed before Ex. agreement is made - no present interest in Eq. Pow 210. 2 P. Wms 629. &c. cus (S. by Ch.) if the devise was for payment of debts. (Pow 215. 2 Ch. 6. 146.) Sed Quare. -

Of things devisable under Stats. H.8. & our own.

1st As to the Subject matter. "All Lands" not devisable by Custom are devisable under these Stats (Pow 220.) "All Lands" here denote the subject-matter not the time only Estate. Pow 229. - All estates are not devisable, but all Lands are; i.e. if the tenant has a devisable int in them.

Tenements & hereditaments "not valuable" are not devisable under these Stats. - as personal franchises ways &c (Pow 217. 220. 41. 45. 36 & 32. 10 H.8. Cro E. 359.) words in Stats of H.8. "of annual value". - ways not devisable here I suppose - no Estate - easement only - words "Lands & other Estate".

Advowsons devisable being valuable. Pow 220. 6. Cro E. 369. 1 Atk. 619.

Rent rents are devisable under Stats H.8 (i.e. if the owner has a devisable interest in them. (Pow 220. 221. 8585. Cro E. 805. 3 Co. 33 b.)

An annuity in fee is also devisable. diff. from a rent in this, that it is a yearly pay charged on the person of the grantor. Pow 229. Co. Lit. 144.

2nd What Estate is devisable under Stats. H.8. as ours - i.e. what interest devisor must have in y. thing to be devised.

In Engd no other than a fee simple estate is devisable under Stats of H.8. tho words "Estate of inheritance" in 32. H.8. being declared by 34 of H.8. to include estates in fee simple only. Pow 218. 229.

The words of our Stat being general, "Lands & other Estates" include also estates pur autre vie, granted

Of Devises.

Chattel interests are devisable at C. L. (Pow. 6. 2 Bc. 374. 2 Inst. 7.) - as terms for years.

There are several Estates of inheritance in lands, called Estates in fee simple. 1 Fee simple absolute. 2. determinable. - 3. base fee - 4. Conditional. Pow 230. 7. Pow 557. 2 Bl. 109. 10. 1 Since the Stat. de donis fees conditional are confined to personal hereditaments. e.g. an annuity descendible. Pow. 232. 237. 239. 1 Ro. 840. 1 Bro C. 326.

All these are devisable by Stats. of H. 8. "Fee simple" used in its most general sense, & as distinguished from Estates tail, & per antes vie. Pow 232. 3 Bulst. 184.

So Estates in fee simple may be in poss.n or not in poss.n as to y former there has been no contrariety of opinion. always holden devisable. Pow 232. 4. 5.

Fees simple not in poss.n may be divided into - 1st Reversions - 2d vested remainders - 3d Contingent remainders, Executory Devises &c. - 4th Estates subject to a condition of re-entry. Pow 232. 4. Plow. 154.

These interests are all devisable, except y last (Pow. 232. 4. 3 Bulst. 184.) tho formerly holden that y 3d sort was not. Pow 34. 600. 2 Bl. 222. 1 Ves. B.C. 33. Cro C. 281. 293. or 387. 405. - "Estates in poss.n" &c. ib.)

As to devise of reversions vid. Pow 234. 106, 7. 2 Burr 621. 2 Vent 285. -

A reversion expectant on an Estate tail is devisable, under Stats. of H. 8. Pow 235. 10 Co 81. 7 Co 13.

So a remainder expectant on an Est. tail is devisable. (Pow 235. 1 Rol. 609. Cro E. 111. 1 Ind this is a vested rem.r 2 Wms. 181. 4. 184. 5. 192. 7 Co. 30. Dal. 232. 3 Ch. C. 488. 9. x. Estates in poss.n &c.)

In Con. there can be neither reversion nor remainder expectant on an estate tail. Stat. C. 24.

Estates in fee simple, may be legal or Equitable. Both are devisable under Stats. H. 8. Dowrs. E.g. an Eqty of Red. (see title mortges", Pow. M. 109. 2 Burr. 978.) – So if an Estate is granted to A. in trust for B. & his heirs, B. may devise it. (Pow 235.6. 1 Leon 257.) Like uses before St. 27 H. 8. (ante.)

3d. What estates may be created by Devise. Tenant in fee simple absolute, may devise an absolute fee simple. So of course, any other fee simple which can be created in the subject by act of ye. party. Pow. 237.8. 3 Leon. 2.6.

So one having an absolute fee simple in possn, remr or revers. may by devise create a fee tail. Pow 238.240. 1 Rol. 609. F.2 Co Lit 111.

But a devise of a fee simple after or upon a fee, is not good, e.g. to A in fee & if he die without heir, to B. in fee. Pow 238.9. 10 Co 97. 8. Cro. C. 57. 2 Id. 231. This rule, however relates to devises considered as dispositions in presenti – not to execy. devises – by these the rule is now evaded. Pow. D. 250 &c. Pow. 238 margin. But the case stated by way of example, will be void by way of Execy. devise – contingency too remote, ("Estates in possn." &c page) – as to remds. created by devise, & "Execy. Devises" see "estates in poss." &c. Pow. D. 248.276.

So tenant in fee may devise to one for his life, or pur autre vie – Devisee may enter, in these cases, immediately on devisors death. Pow. 240.1.

The reversion in these cases, descends to the heirs of Devisor. Pow. 241.

So tenant in fee, after having devised for life or in tail, may devise other estates out of the Estate remaining

rem-

in him, i.e. the reversion) till his whole fee is exhausted. The latter to take effect upon the expiration of the former. E.g. to A. for life - then to B in tail - then to C. in fee. Pow. 241. Hou. 35. 1 Sid. 285. 2 Rolle 29. 3 Co. 84. 1 Lev. 144.

And a limitation of the ulterior estate remaining in reversion (as supra) may be either by way of remainder or by devise of the reversion (Pow. 242.3.) See "Estates in possession" &c

A term for years or lands may be created by devise. Pow. 243. 1060, 78.) & de novo. - (Courts a term for years be created out of Lands, de novo at C.L.? Pow. 6. 243. 2 Ld. C. 374.

Estates created by devise may be absolute or conditional. E.g. "to A. for life" generally: or "to A for life he paying a certain rent," to the heir, &c (Pow. 245.6. Dy. 126b. 348.

And these conditions may be precedent or subsequent. Pow 246., see "Estates on condition";

There are no technical words to distinguish these two species of conditions. Every Condition is to be construed as precedent or subsequent according to the apparent intention of the Devisor. Pow. 246.7. Salk. 164.

But a Cond.r describing the qualification of the devisee to take, is, in its nature, precedent. E.g. to A. provided she marry with consent of testators Exors. - marriage with their consent is a condition precedent. Pow 247.3. 2 Vern. 573. 340.

But a devise to A. & his heirs, upon condition that within 3 mos. after testators death he executes a release of all demands to B. subsequent - devise a present interest. Pow. 248. 11 vs. 420. Salk. 165.

Estates created by devise may be either legal or equitable - A devise of Lands, i.e. where devisee hath legal

(J. Jervis).

estate) - on a use, since the Stat. of uses 27. H. 8. is a devise of a legal estate. (Pow. 270. 1) For the Stat. executes y^e use - transpus y^e legal estate to it. 2 Bl. 330. Pow. 8. 236. 278. &c

1. But a devise of a use, before y^e Stat. of uses, was of an Equitable estate only. (So at this day, is a devise of a trust in Eq^y. Pow. 271.) Property is s^d to be holden in trust when y^e legal title is vested in one, in trust for another. Pow. 283.

Uses were devisable at C.L. before the Stat. of uses. Pow. 271. 8.

If land is devised to one, no use being limited upon it, it cannot be averred to be to y^e use of any other than the devisee. For this w^d be contrary to the intent upon the face of the instrument. Pow. 271. 4 & 4.

But if a use is limited, it will enure to cestuy que use, & will be executed by y^e Stat. of uses. Pow. 271. 2 and 312. Mo. 107. 1 Leon. 253. Popl. 4. 2 S. Kay. 3. 5.

If land is devised to A. & his heirs, to the use of A. for life only, y^e use of the fee is in devisee's heir. Pow. 272. Popl. 4.

2^d So an Equitable estate may be devised, tho' y^e medium of a trust. Pow. 282. Property is s^d to be holden in trust, when the legal estate is vested in one & remains in him, in trust for another. Pow. 283. 2 Bl. 333. 0

Indeed such uses as are not executed by the Stat. are called trusts. Pow. 283. 2 Bl. 333. 0. Eq. C. ab. 383. 5 Mod. 03.

As to the origin of trusts see 2 Bl. 333. 0. Pow. 283. 8. 284.

Different between uses & trusts.

The former executes the legal estate - the latter does not. Pow. 282.

Cf Devises.

For the distinction between trusts executed & executory, see Pow D. 286. 7. 1 Atk 581. — 1. where the trustees are directed in the instrument, creating the trust, to execute a conveyance of the Legal Estate, it is executory. 2. where no further conveyance is directed it is executed. But the executed trust does not include ye Legal Estate; it is only an equitable interest — "Equitable trust". Pow 286. 7. 1 Atk 581. a decree for conveyance of the Legal Estate is as necessary in the one case as the other. (Sidem.)

Ld Hardw says: that all trusts are, in their nature, executory. Pow 287. 1 Atk 581. 2 Ves. 323.

One may devise, not only devisable interests, but an authority over such interests. e.g. Devise that, "J.S. shall have the disposing, selling, letting & ordering of his Estates Lands. Such a devise however gives devisee a power only to manage ye Land as he pleases, & to lease it at will — not to sell or lease it for years: for he has no interest. Pow. 284. 290. 292. by. 36 Cro E. 678. 734. 74. 341. 3 Jdr. 78. c

But if one devises "that his Exrs shall sell Land or orders that his Land shall be sold by them — or appoints, constitutes & empowers them to sell —" they have authority to sell. Pow 292. 3 Mod 774. 2 Vent. 113. 1 Vol 330. 14.

Devise "If my personal Estate is insuffe my Land to A & B. as trustees to sell for payt of debts &c all the residue of my real Estate, to A... Personal is insuffe A takes all ye real immediately. Comp 43. 2 d. Rays 1324. 5.

Authorities devised over Lands are of 2 kinds 1. Naked 2 Coupled with an interest. Pow 292. Comp 263. ag.

(Powers understood at C.L. before ye Stat. of Uses 27 H. 8.

- in this rule - modifications of uses. Comp 263. 266.

I. A naked authority is a bare power to sell &c. no interest devised as in the last r. 95 supra. Fon 292. 302. Co Lit. 113. 1 Roc. 330. Cro E. 352. Mo 774. vid. Co L. 113. n. 2. 236. 181. b. n. 3. Comp 466. 3 East 553.

In these cases the perhaps descends to the heir, till sold. Fon 292. 3. & Co L. 113. 1 Mod 236. 265. 3 East 553.

And a release of such authority to the person empowered, is void. E.g. if A empowered to sell release to the heir - the release passes no interest. for A has none. Fon 293. 4. Co Lit. 440.

Such authority must be strictly pursued, & the execution of the power must, therefore, be construed with reference to the power itself. Fon 294. 20 & 24. & 2 East 370. 1 Bur. 120. Comp 267, 268. 644. 1 Wils 170.

So the authority is strictly personal - not transferable - personal confidence - If three are two, one dies the other cannot execute it. So the both are Exors; for the take not as Exors but as trustees. Fon 294. 5. Jenk 44. 1 Anderson 145. Dy. 17. 32. vid. Root 67. ("Municipal Law" 10)

Of course, the power does not survive to the Exors. of the original Exors, in the last case.

So if the devise is, that his land shall be sold by his Exors, & the Exors of his Exors" surviving Exor appointed to do this; they cannot sell. for they are not Exors to both the original Exors. Fon 296. 6. Mo. 61.

But a sale, satisfying the words of the devise will be good in this respect, E.g. one appoints 3 Exors & devises his land to be sold "by his Exors. If one dies, the

by the other two is good. (Pow 296. 7. 1 Vidnson 146. Cro E 26. Dy. 176 b. 219 a. Co Lit. 113 a. Mar 341. Cro E. 824.

If testator devises that his Land shall be sold, without naming the person, by whom, his Exrs are the proper person to sell. (Pow 307. 298. 9. 2 Leon. 220. Dy. 37. 1 Lev. 30. 1 Vent. 423. 1 Bac 200.) if they are to distribute as in case the monies; as to pay debts &c.

But if the Exrs has no concern with the monies of the sale yet heir is the person to sell, i.e. if the money is not already in the hands of the Exrs. (1 Vent. 420. Pow 294. 1 Lev. 304. Pow 307. and in the last case but one, the surviving Exr. may sell alone. - for they take as Exrs - which ceases upon the same principle, it seems, that the Exrs of the Exr. might sell. Pow. 295. 7. 307. 2 Leon. 220. Dy. 371. b.

If the person thus empowered to sell, refuses to do it, those for whose benefit the sale was intended, may in Chy compel him to sell. Pow. 300. If the person appointed shd die, yet Chy will supply a trustee, semb. Pow 303.

2d. A devise of Land (or of an estate) to Exrs, or to A. B. to sell, is a devise of an authority coupled with an interest. Pow 301. 2. 1 Mod 236. 260. and Co Lit 113. a. 2. 236. 181. b. n. 3. Cro 304.

So if one devises the profits of Land to A. till his Son is 21. to educate him. yet authority of A. is coupled with an interest. (Pow. 301. 2 Leon. 221. 376. 78. Dy. 219.)

In these cases the Devisee, not the heir, shall have the estate till the expiration of the time limited. If devisee shd die, his exrs will hold it during yt time limited. (Pow 302. Cro E. 252. Co Lit. 112. 113. 181. 766. 233. Hutt. 36.

2 Leon. 221. 1 Bac 208. 3 Leonard 78.) for it is his Estate, during the term.

So, the Estate of devisee will continue till the Expiration &c. tho the object of the devise should be soonr answerd: E.g. of the Son (supra) & dies before 21. Dow. 302. 1 Ch. Ca. 95. Dy. 210. The rule is otherwise, as to naked authorities.

Under a limitation of an Estate to "such child & children" of A. as B. shall appoint, an exclusive appointment to one of the children is a good Execution of the power. 1 T.R. 432. 2 Vern. 513. 1 P. Wm. 149. 1 Atk. 389.

A power to appoint by devise is not executed by a mere residuary devise. E.g. A having a Legal Estate in trust with a power to devise to either of his Sons, devises "all his his real Estate" to his Son B, "after payment of his debts" &c. Trust Estate does not pass. (8 T.R. 118. 2 P.C. Bc. 136. 1 Atk. 558. q. 2 Bro Ch. 297.) — no such in Law C. 8 T.R. 122.

An appointment by will, is no Execution of a power to appoint by deed. Cowp 260.

Who may take by Devise.

In general all persons not incapacitated by positive Law may be devisees.

Under the Stat 32. H. 8. as explained by Stat 34 H 8. devises to mortmain are not allowed. i.e. devises to Corporations or bodies politic. The Stat. 43. Eliz. authorizes devises to charitable uses: but the exception is much narrowed by Stat. 9 Geo. 2. Ca. 314. 1 Bc. C. 479. Cas. 136. 1 Bc. C. 268.

Of Devises.

In Com. Corporat. not incapacitated to take by devise. There then all corporat. which can purchase thod. lands, may be devisees.

Devisees may, then, be natural or civil persons - except, in Eng. so far as the latter are disqualified by the above Statutes. Pow. 315.

1. Natural persons, capable of taking by devise may be either in esse, or not in esse. Pow. 315.

Those in esse may be devisees, unless prevented by some civil disqualification. Pow 315.

Coverture is no disability - Husb. indeed may, at Law, defeat the devise by disagreeing to it; but this will interpose to prevent him from injuring the wife. (Pow. 315. Cirk. S. 43. 4.

So, wife may be devisee to husb. tho she cannot be grantee - for devise does not take effect till his death. Pow 315. 316. Eq. C. Ab. 173. 2 Co. Lit. 112. 1 Mod. 210. Holt. 241.

An alien may take as devisee, but he can hold only till office found - the estate then vests in the King - here in this State, I suppose. Pow 316. 18. 2 Ves. 360. 4 Leon. 84. 9 Co. 141. 3 Bac. 258. 9. as to office found.

An illegitimate child cannot be devisee, till he has acquired a name by reputation - but he may then take by that name. E.g. Devise to "the son of A" not good, he being a bastard, till he has acquired the reputation of being A's son. - A devise to "A.B." he having acquired that name, is good. Pow 314. 338. Co. Lit 3. a. 1. Dy. 313. Noy 35. Cirk § 26. Cirk 2 Eq. 2 Ld. 149. 1 Salk 410. Mo. 10. 6 Co 65. 2 Mod 43. But if a devise is made to "the children" of A. his illegitimate

will exclude his illegitimate children. (Pow. 344.5. Mo. 10. Noy 35.) Suppose such a devise in mother of y^e bastard: no difference semb: Pow. 345. Mo. 10. Co. Lit. 123^b. Dy. 345.

2. As to natural persons not in esse — as children in ventre sa mere at the devisors death. "Parent & Child" "Est. dep. in poss^n" &c.

Distinction formerly taken between a present devise to an infant in ventre &c, & a devise by way of remainder — y^e latter was holden good if the infant was born, when the particular estate determined — secus not. (Pow 320.1. 2 Bulstr. 275.6. Mo 637. Sal. 228.

But now by Stat. 10 & 11. W^m 3 if an estate is limited to one with a contingent remainder to his unborn child, a posthumous child shall take, as if born in fathers lifetime. (2 Bl. 169. 3 Bac. 124. 4 Ib. 312.) Sed Qu. whether this Stat. extends to devises? (Sal. 228.) Semb: not.

So, a distinction has been taken between a devise to a person not in esse, per verba de presenti, and per verba de futuro. In the latter case it is well settled y^t the person may take. e.g. to an unborn child, when it shall be born. (Pow 322. 1 Eq. Cab. 173. n. 2 Bulst. 275. 1 Sid. 153. 1 Lev. 135. Sal. 229. Stra 1003. 3 Bac. 124. Fearne 427. 5 T. R. 2.50.1.

The latter is good by way of Executory Devise. (3 Bac. 124.) & the freehold descends to the heir in the mean time. Ib. Pow 326. Vol. 609.

That last distinction does not contemplate remainders, but direct devises to infants in ventre &c.

So, under a devise to such children as A shall have living at his death, a posthumous child will take, [illegible] [illegible] 50. 1 P. W^s 246. 2 Freem. 223. 2 H. Bl. 399. 1 Ves. 263.

(But whether a devise to an unborn infant per verba de presenti is good, he being unborn at devisor's death) is not settled in Eng.^d according to Powell. 322.23. Opinions contrary, (Dy 303.^b Moore 637. 2 Bulst. 273. 276. Sid 230. Lay. 83. Moor 177. 1 Lev 135. 156. 1 Freem. 244. 2 Mod.^s 8.9. 1 Wils 105. Fearne 428.) e.g. I devise to the unborn son of A." &c. – The weight of opinion is in favor of the devise. Pow 330. 3 Bac 124. Doug. 476. arg.^d 4 Bur. 2157. Bl. R. 643. 2 Wils 225.

The objection to the infant's taking in such a case is, that as he has no capacity to take when the devise takes effect, the freehold must be in abeyance till he is born, if he takes at all. Pow 324. 3 Bac 124.

But why does not the objection (if it amounts to any thing) hold in the case of an executory devise, to such an infant, which is clearly good? The freehold descends to the Heir in both cases, till y. infant is born. 2 Mod 4. Pow 320. (Rol. 609.) Heir not accountable for intermediate profits. 5 T. R. 57. 3 Wils 526. 6 Co Lit. 11^b n. 4.

At any rate, if there are express words used or facts adverted to, in the devise affording an inference that testator was aware of the devisee's incapacity to take immediately, he shall take, as by a future devise. e.g. "To the unborn child of A. when he shall be born." So, "if such a child shall be born, I devise to him" &c. Pow 332. 3. 1 Lev. 135. 1 Eq Cab. 173. 12. 2 Ketb. 300. 1 R. 752. Sid. 229. 230. Talbot. 146.

And according to the more modern & better opinions every devise to an unborn child, does afford such an inference: because it implies a disposition to take effect

at its birth; (i.e. an executory or future disposition. 4 Bur. 2171.) (Pow. 326. 329. 330 margin. Sal. 230. Freem. 428. Wils 105. 2 Atk. 8. 9. 1 P. Wms. 486.)

As to a devise to an infant in ventre sa mere with a conditional limitation over, if no child born, see Comp. 40. Com. 6437. 279. Cro. El. 361. Moore 436.)

Civil persons may be devisees – as Exors or admors. e.g. Devise to the Exors of J.S. is good. (Pow. 336.) To civil persons, not in esse, if the intent is clear. e.g. to the Exors of J.S. to be. Pow. 336.)

But parishioners are not such civil persons as can take in that character. Pow. 336. Qu. Wh.?

Every Devisee must be properly designated, or he cannot take. The designation may be by either naming or describing him. – and tho' his name is mistaken, still if he is sufficiently designated by description he may take. – (not if the name applies to any other person. (1) Pre. 293. Co. L. 3a. 11 Co. 21.) (2) 1 Atk. 410. Pow. 498. 5 D. & E. R. 671.). – (this position requires to be taken with qualifications. Parol evidence may under certain restrictions, be admitted to explain the ambiguity of which, post. E.g. applying to rule: "to the Governor of the State" – the "Governor" &c. Hob. 32. Co. L. 3a. So if "Son" of such an one is sufficient. Pow. 340. 337. 407. 405. 495. 1 Cal. 837. Hardw. 91.

And the description tho' not strictly applicable, may be made good by reputation e.g. to A. [illegible] of [illegible] – A being a bastard. Pow. 338. 1 Atk. 410.

But this rule does not hold in favor of one born [illegible] after a devise made; for he must be capable

of taking, if at all, at the time of his birth; but he can't gain y^e reputation of being Child to any one, but by the "continuance of time." (Dow 338. 4 Cro E 504. 10. 6 Co 66. 6 Co Lit 123.^b 1 Ld R. 52.) Besides, y^e birth of such a child is potentia remotissima. ("Potatus ex post." &c.)

Hence also, a devise to all the natural children of A. will not enure to y^e benefit of one in reality so more. (Dow 339. 6 Co Lit. 330.)

A woman may take a devise under y^e description of "the wife of A." if she is reputed to be his wife, tho' she is not his Lawful wife. (Dow 340. 8 Co. 73.^a)

So, a devise may be constituted by an equivocal or innuendo designation, e.g. under a devise to the heirs male of the devisor, a daughter may take, if such appears to have been the intent; the proviso giving the words designated, a sense. (Dow 340. 496. Dy. 337. Moore 1045. 2 Roll. 39.) and a son will take under the description to the exclusion of an elder daughter.

So, a daughter may take under the description "proximo sanguinis" of the devisor, tho' the adjective is masculine, as if there is no son. So the elder daughter, in this case excludes the younger. (Dow 342. 6 Co Lit 10.^b n. 2 Roll. R. 303 & q. C. ab. 212. 4. and 2 Bl. R. 1002.

The word "Child" or Children is a sufficient description. E.g. "to A for life & afterwards to his children." his children take a life Estate in remainder. (Dow 344. Moore 220. 66. 17.^a) Descriptio personarum.

The word "Children" is q^n^ casus as descriptio personarum, not a word of description in which case q^d^ persons

described take as purchasers. E.g. last case. So, if an Estate is devised to A. "his children" (he then having children) he & they take a joint Estate as purchasers. Pow. 344. 66 17b. Cro E. 743.

But if A in the last case had, at the date of D. devise no children, "children" is a word of limitation & children take as heirs. They cannot take in remainder as purchasers, because there are no words of remainder, and they cannot take a present Estate as purchasers, not in esse. ergo A takes an Estate tail. Pow. 505. 66 17b. Doug. 309. 10. 1 H. Bl. 456. 468. 10 Bulst. 219. 1 Roll 227. 231. 4 Co 2. 294.

The description of a devisee may be general or special. Pow. 345. 6. By a general description is meant a designation of any person who may happen to answer the description. —

1. General. As if one devises to A. S. in tail, rem. to the next heir male of D. devisor. He who happens to be next heir male is constituted devisee. Pow. 346.

So, devisee may be constituted by a devise to one's "stock", "family," or "house" — it will enure to the "heir principal" of the house or family. Pow. 346. Hob. 33. Cy. 333. 7

If a devise is made to "the posterity" of A. his lineal heir if he has one shall take; if not, his collateral heir of the whole blood. Pow. 347. 2 Eq. Cab. 290.

If a devise is made to "the next of y. name", the testator, y. next relation of his name & blood male or female, shall take. Pow. 347. Cro. 532. Hob. 32.

So a devisee may be described by the words "next of kin" to testator, in which case the person answering that

that description, by the rules of computing the degree of kindred wch take. Pow 347. Cro E. 576. 3 East 278.

And if a publication relate to matter, in which the words "next of kin" are construed to include those only, who answer the description at the time of testator's death. 4 Ves Jr 207. 3 Ves Jr 70. 234. 3 East 278. 294.

So, the words "the nearest relations of my name" is a good description. But in this case "relations" is nomen collectivum, including all testators nearest relations in the degree mentioned. Ex. gr. his brothers & sisters unmarried; if he has no nearer relations. Pow 497. 347 &c. 1 Ves. 335.

If testator explains whom he means by "nearest relations" persons not falling within y. description may take. e.g. to my nearest relations, viz. the Stiles' and the Nokes'. Here the latter sha not be so near in kindred as the former shall take. Pow 350. 1 Bro Chy. 32. vid. Pow 373. 374. 405. 407.

If one devises to his "nearest relations, according to the Stat. of Distributions," his wife takes no part. For she sh'd be entitled to a part under y. Stat., sh. is not his relation; i.e. is not related by consanguinity. Pow. 350. 1. 1 Ves. 84. 3 Atk. 75. 1. 701.

If one ut supra bequeaths personal property "to my nearest relations, those relations who would take under the Stat of Distributions, are the Legatees. So held, tho' the words were "my relations." Pow 351. 697. 2 Eq. C. Ab. 337. 1. 355. Talb. 251. Ves. 84.

But if the devises of land were thus described

Quere whether the above rule would hold, or whether the devise wd be void for uncertainty. Pow. 352. vid. 3 East 276.

In Con. I presume, the Ct. wd ascertain y devisee in the last case - for one Ct. mantains y. exception as well to the real as to the personal Estate of intestate. Stat. 166.7.

If one devises land to y. next of his name, "it was Quere whether a daughter, who by marriage hath changed her name can take, according to some: this is the distinction: if she is unmarried both at the time of y. devise & of testators death she may take, tho married when the Qu. arises (Pow 352.3. Cro E. 576. 532.) Seems if she be married, either at the time of the devise or testators death.

But L^d Hardw. seems to be of opinion, that if y. devise is immediate or by way of vested remainder, as if she is unmarried at the time of the devise - If limited upon a contingency, that her name at the time of the contingency's happening, decides her right. (Pow. 353. 1 vern. 338.

It is a general rule of construction, founded on feudal principles, that if an Estate of freehold is devised to one with an immediate or intermediate remainder to "his heirs" - "the heirs of his body" or "his issue," he takes an inheritance - in the first case, a fee simple, in the two latter an estate tail. Co. L. 355. & 21 E. C. 242. 2 Roll. 6. 41. 1 Co. 99. 2 Stay^d 873. 2 Wils 323. 1 Burr 38. 4 T. R. 82. 294. 5 H. 299. 320. 6 H. 30. 7 H. 503. 8 H. 16. M^r Powel's Essay 2. Fearne 25. & 1 Burr 257. Doug 323. 3 Ves. 437. Salk 1125. 2 Atk 246 &c (where the remainder is a fee or an intermediate limitation, the devisee takes an estate for life, &

the inheritance is remainder - former not merged
Doug. 323. 330. 1. 2 Atk 246. 250.

The words "heirs" to be construed in such cases as words of limitation - not of description - i.e. to ascertain the quantity of interest given to the first devisee & not to designate the persons who are to take after him. Purris' Essay. 1. (Note, where no previous freehold is limited to the ancestor, the word "heir" is as apt a word of description as any other. (Vide pa. 2. & post.)

But as the reason of the rule has ceased with the abolition of feudal tenures, &c. endeavor, as far as possible, to narrow the rule. (Pow 357.) & almost always defeats the intention.

An heir may therefore, at this day, take a remainder as a purchaser under the description of "heir," &c. tho a previous freehold is limited to the same devisee & his ancestor, if it appears from the devise that the word "heir" he was intended as a description person. Pow 358. Moore 372. Cro E. 40. 6 Co 17.b Sal 224. L. Ray. 203. 4 Bur. 2579. Purris Essay. 1 Eq. Ca ab 184. E.g. to A for life, remainder to his heir for life only. Pow 358. Mo 372.

So, to A for life & to his eldest issue male. (Pow 359. Cro E. 40. 6 Co 17.b.) A takes for life only. Seems if it had been limited to his eldest heir. Pow 363. 1 Atk 411. 2 Ld. Cro E. 313.

So. to B for life &c. & to his issue male, & his heirs forever. Here B. takes for life only, & his issue male, a remainder in fee. Pow 359. Sal. 224. L. Ray. 203.

"Issue" in its most proper sense is description person. but it has been generally construed as a word of

limitation, except when the intention to use it in its proper sense has been manifested. Pow. 360. Stra. 731. 1 Co. 103.b. Cro. E. 40. 4 T.R. 294.

If an estate is devised to "A for life & after, to the next heir male of his body & to the heirs male of his body," "heir" is a word of description. A takes for life only, & his next heir male a remainder by purchase. Otherwise y. word "next" & the superadded words are nugatory. Pow. 363. 4. 1 Co. 66. see Fearne 25.4 & Harris 757.

2d. A description of the devisee may be special, i.e. an actual description of a particular person — not a designation (as in y. above case) of any person, who may happen to answer y. description (Pow. 365.) E.g. "To A. the son of J.S." Here the description designates not merely a son, but a particular son of J.S. (Dy. 357.)

So, "To the heir male of the body of A. now living," i.e. to the present heir apparent of A. Pow. 365. Eq. Ca. ab. 214. 1 Vent. 334. 2 Lev. 311. Ray. 330. 3 Lev. 632. 2 Vern. 660.

So, "To the second son of A." This is a special description of y. 2d. son in order of birth. Pow. 365.6. 2 Vern. 660.

General rule. Necessary that the devisee answer in all respects, y. description given him. Pow. 367.

Hence if devisee is described as heir of such a person, he must shew that he is heir in that sense, in which the word is used by testator. Pow. 367.

Thus: if one devises "to the heir" of B generally & B is attainted of felony, B's eldest son cannot take; for B. can have no heir. Pow. 367.8. Jenk. 203. 1 Ro. 193.

So if one devises to the heir of B. generally, & dies

living

living B. B's eldest son cannot take for "nemo Est Hæres viventis." Pow. 369. 2 Leon. 70. Dy. 99a. 64. 1 Co. 66.

So if testator describe any particular heir, as "heir female" of B. (without more) ye person to take must answer ye description in both particulars - i.e. he must be heir as well as a female - ergo, if B. has a son, his daughter cannot take. Pow 370. 382. 385. Hob. 34. 2 Rol 414. Moore 860. Co Lit. 28b. 29a. 2 Wils 1. (next p-g)

But if the devise shews by positive words, or necessary implications, that a person, not heir general was intended to take by the description of a particular heir, such person will take. E.g. "To my heir, who is my brother &c." here A B. will take tho not heir general. Pow. 373. Hob. 34. 1 Vent 372. 1 Salk. Ray. 185. Ca. Eliz. 463. 467. 464. 465.

So, if the intention is clear (ut supra) one may take under ye description of heir in the life time of his ancestor as if testator takes notice that the ancestor is living. e.g. "to the heirs male of the body of A. begot" - giving him also a legacy. Here construed heirs apparent. Pow. 376. 8. 1 Salk. 229. 1 Bro. C. C. 489. 2 Bl. R. 1110.

Indeed it is a general rule of construction, in all devises, that the intention of testator shall govern, if consistent with the rules of law. Doug. 324. 9. Dy. 3. 4. Colby. 430. This is the first and great rule in ye exposition of devises.

But there has been much doubt, whether if an estate is given to one, remainder to the "heirs male of his female of his body" (4 words being words of description)

it would be necessary that the person to take (i.e. by purchase) ꝑ d. be heir, as well as male or female - viz. the 2d. is the same if an estate is limited to the heirs &c. of the body of a Stranger, e.g. "to the heirs female &c. of the body of J.S." wife his daughter take, he having a son? - semble the wife. Pow. 381. 395. Pre Ch. 442. 461. 5 Bur 2647. Co Lit. 164ª n. 2. Mont 372. Ray. 228. & Bil 24. 166. 93. (vide last pa.) - Distinction between this case & that in last page: "Heir female" (without more denotes heir generally (Pow. 387. Co Lit. 27ª.) But "heir female of one's body," designates his female issue whether heir generally or not. Pow. 388. Co Lit. 9ª. 7 Co. 35ᵇ.

A person is no doubt answering ꝑ description of an heir, may take under words, implying to constitute an heir. e.g. "I devise that my wife shall be sol. heir of all my real estate." So of a mere stranger. Here the words "heir" does not designate the devisee, but the interest which he is to take. (Pow. 395. 8. Hob. 75. N. 48. Hob. 34. Show. 308. Moore 884. 1 Freem. 293.) The devisee takes a fee. Pow. 396. N. 48.

But if one by devise makes A heir of his lands, & will takes only his chattels real. Pow. 398. 9. N. 48. Pre Ch. 671. 3 Ath. 644 Show. 301.

After all, it is a general rule, that if the description is so far certain, that the person intended may be distinguished from every other person ꝑ devise shall not fail for trifling omissions (Pow. 393. 394. 5. 419. - for a devise is not to be construed void for uncertainty, unless necessity. Pow. 348. 9. 422. 1 Ves. 333. 10 Co. 57ᵇ. Plow. 345. 523. 6 Co. 16ª. Hob. 32.

Of Devises.

E.g. "To Margaret y^e daughter of A.B." her name being Margery. Pow. 405. y. 1 Th. 293. 1 Inst. 3a.

So "To the wife of A.B." A.B. dies, his widow marries A.D. & then the latter dies - she shall take. Pow. 405. 6. 10 Mod. 343. Hob. 344.

So where a sick man devised to his "posthumous ch.", then in ventre &c, & the ch. was born after his death - it was adjudged to take under that description. Pow. 406. Per Ch. J. 5.

But if the descriptⁿ is false & not merely defective, y^e devise is void. E.g. to the heir of A. - A living relation. Pow 407, 15 Ed. 193.

Sems, if the person claiming under the devise is reputed to be y^e heir of A. Pow. 408. 2 Vid 151.

How a devise may fail of taking effect.

A devise may be ineffectual either from defects appearing upon the face of it, or from something extrinsic. Pow 409.

Of the first kind is any uncertainty or repugnancy in y^e words used, as to the thing devised &c, the interest in it, or as to the general intent of the devisor. Such uncertainty is termed a patent ambiguity. Pow 409.

So limitations contrary to the policy of law, fail under the defect appearing &c Pow 409.

Extrinsic objns to y^e validity of devises are foundⁿ some uncertainty or repugnancy, arising out of fact not appearing on y^e face of y^e instrt. - As when a devise arises to whom of two or more persons or to which of two or more things respectively answering y^e descriptⁿ in the devise was intended to apply. Uncertainty or repugnancy of this kind is called a latent ambiguity. Pow 409. 10.

first.

1st. As to defects apparent upon the face of the devise — or patent ambiguities

It is an universal rule of construction, that if there is, in a devise an uncertainty, which cannot be explained or a repugnancy which cannot be reconciled, the devise is void, so far as the uncertainty &c. extends, & the heir at law shall be preferred. Pow. 411. no parol Evd. admitted.

Such uncertainty &c. apparent on the face of ye. devise, may be either as to the subject-matter or thing devised — the quantity of interest meant to be devised — or the person described as devisee. Pow. 412.

1. As to the subject-matter, e.g. "I devise a part of my lands to J. S." — Devise of a "messuage" or "house" with the "appurtenances" carries no other land than is necessary to the enjoyment of the house unless it appears, that the words were intended to be used in a more general sense. 1 Bos. & P. 53. 2 Co. 32. 6 Co. 6. 57. 6 Co. 2. 16. 113. 704. 2 Atk. 498. 1 P. Wm. 600.)

2. As to the quantity of interest. e.g. "I devise my freehold to my wife for 5 years; & if any of my 3 sons die before the 5 years are out of the freehold, then to be equally divided" &c. What to be divided? ye. freehold or ye. term of 5 years? Pow. 412. 417. 1 Keb. 602. 754. 773. 2 Lev. 288. ... abr. 357. Parol evidence not admitted. (Post.)

3. As to the person describing: If the person described as devisee is absolutely uncertain, ye. devise is void. E.g. "to ye. first man in &c." Pow. 418. 2 Andrews 12. 3 East 172.

So, "to one of the sons of J. S." he having several. So, to "20 of the poorest of my relations". Pow. 418. 2 Ves. 326. 5. ... 1 Bro. ... 1 Bl. ... 81. Bro. ... 268. ... 182.

So

So, "To my wife for life, remainder to the heirs male of any of my sons." Pow. 420. Sti. 240. — no parol evidence admitted in these cases. (Post.)

But a devise is never construed void for uncertainty, but from necessity — to be explained if possible. Pow. 422. 348.9. 1 Ves. 335. 10 Co. 57b. 2 L. Ray. 1312. 10 Mod. 103. Hob. 32. Cro. E. 106.

2. As to uncertainty arising from something dehors — or latent ambiguity.

If from extrinsic facts the person of the devisee is rendered absolutely uncertain, y. devise is void. E.g. "To my son," there being several. So, "to J. S. of A." there being two of that name there. Pow. 424. 5 Co. 68b.

So, if from extrinsic circumstances, it is absolutely uncertain what land is meant — e.g. "my manor of R." he having two of that name. Pow. 425.

But if the devise were "of one of my manors of R." y. devisee might elect. Bac. Max. 100. Pow. 425.

How far parol evidence is admissible to explain ambiguities, post. Pow. 435. &c. 6 T. R. 671. 2 Atk. 374.5.

A devise may fail of effect for divers other causes: examples. A devise may fail of effect because testator's intent is contrary to the rules of law — (Intrinsic defect.) Pow. 409. E.g. To A. in fee, & if he die without heirs to B. Pow. 426. (1 Bulstr. 63. Qu. as to y. e.g.) 3 T. R. 145.6. Pow. 431. Sal. 234.

So, if in y. draught of the instrument, testator's instructions are not followed. E.g. testat. directs a devise of lands to A. for life — but y. words convey a fee — void in toto, not good for life — for there was no devise for life. Pow. 426.7. Mo. 356. Qu.

But

But if that which is agreeable to testators intent can be separated from that which is contrary, the former is good, & latter void. E.g. testator directs an absolute devise, scrivener annexes a cond.ⁿ – condⁿ only void – devise absolute. Pow. 427. 1 Eq. Ca. Abr. 113.

A devise may fail, because if operative it would effect no more than the law would effect without it. E.g. one devises land in fee to his own eldest son, or next heir – devise is ill & void, & son takes by descent. Pow 427. 8. Dy. 12. 124. 350. Hob. 29. 1 Vent. 11. 2 Mod. 5. Jenk 248. Plow. 545. Str. 4. 2 Bur. 880. 3 Co. 2. 137. Comyn 120. 2 P. W. 135. Sal. 590. 1 P. W. 397. 2 Co. 51. L. Raym. 523. 727. Sal. 233. – As to what acts will break the line of descent see, Co. Lit. 12. 1 Show. 63. 2 Vern. 633. Cowper 141.

And the rule is general, that if one devises to a person, who is his heir, the same estate i.e. the same quantity of interest in the subject matter, as he would have taken by descent, & not by purchase. Pow 427. 30. 35. 1 L. Raym. 723.
the devise is void he shall be in by descent.

The reason of the rule is, 1st that the lord may not be defrauded of the fruits of the tenure. Pow. 355. 430. 2d that devisors creditors may not be defrauded of their debts. Pow 430. 433. 1 Vern. 240. as they would have been before the Stat. of fraud.ˢ devises 3 & 4 Will. 2 Bl. C. 378. Pow. 431. 3.

These reasons have both ceased. But ye rule is still of consequence in Eng. as affecting the course of descent from the heir. 2 Bl. C. 220. 1. Pow. 435. 6. 3 Lev. 127.

In Con. not important – neither of the above considerations operate here. But suppose a person having two heirs A & B. devises half of his estate to A & divides rest as to the other moiety – will not the part, which is

considered as descending to be first applied to pt. payt of debts: Yes: but. this does not seem to render the rule important here, in the sense contemplated - for the case is not within it. A.G. takes by devise according to the distinction Pow 433. 441. - next page.

If one devises to his heir by way of remainder that would descend to him as a reversion, still the case is within the general rule: for the estate is not altered. E.g. "To my wife for life, remainder to A.T." - A.T. being heir apparent - devise void - Pow 430. 435. 8. Vin. 148. 1 Roll. 826. Sho. 491. 2 Lev. 101. 3 K. 115. Sal. 234. Com. 82. 10. Mod 23. 2. Ray. 508. 3 Lev. 127.

So, a devise of an estate for life only to devisee heir at law, if no further disposition is made of pt. subject matter: for he takes all the interest, which he would have taken, if there had been no devise, & the former, which descends, merges pt. estate for life. Pow 431.2. 3 Leon. 26.

Charging debts, or portions, on an estate, devised to pt. heir of devisor, does not make him to take by purchase - pt quantity of int. is not altered - the property is only encumbered. Pow 433.5. Cro E. 833. pl 9. Mo. 644. 2 Bac. 155. Com. 72. Sal. 241. Sho. 1270. 1 Bac. A. 22.; 2. Ray. 728 -

But it has been holden, that if the charge on pt. land is by way of cond., the heir to whom it is devised takes by purchase. E.g. "To A. & his heirs, upon cond. that he pay &c. or provided he pay" &c. Pow 436.8. Cro E. 451. 2 Mod 286. 1 Freem. 248.

(But the weight of authy is as the distinction) Pow 433.4.8. Com. 72. Sal. 242. Cro E. 833. pl 9.

If then a devise is made (which falls within ye gen. rule) to the heir, who at the devisor's death happens to be a daughter, ye birth of a posthumous son will divest her title. Pow. 438.9. 2 Bl. C. 208.

Tho' an alteration by devise as to ye time of ye heir's receiving ye estate does not enable him to take by purchase (Pow. 429. 430. 431. 434. Gilb. 148. Sal. 234. 241. Comb. 72. ye quantity of int. being the same);

Yet, if the limitation to the heir by devise produces an alteration in the course of descent, he takes by purchase, i.e. as devisee — E.g. if one having two daughters, who are his heirs, devises to them & their heirs, they take as devisees: for the devise makes them joint tenants; whereas if they take as heirs, they are coparceners, each having a distinct moiety. Pow. 439. Cro. E. 431. 3 Lev. 127. 8. 1 Leon. 112. 113.

So, if one having two daughters, who are his heirs, devise all his estate to one, she takes the whole by purchase: for if she took only half by ye devise, her sister wd. be coparcener with her of the other half & the intent defeated. Pow. 441. Co. Lit. 163.b Sal. 242. Com. 123. 2 Ray. 829.

And a devise may, upon the general principle in general, be good in part & void in part as to an entire thing. E.g. Tenant in fee devises one half of Blacre to B. his heir in fee, the other half to him in tail — void as to the former, good as to the latter. Pow. 442. 2 L. Ray. 831.

Lastly a devise may fail of effect by ye death of devisee, testator living. E.g. to A & his heirs, A dies living the testator. His heirs cannot take — and this is the case —

the

tho the devise is unpublished after T.'s death - but if a charge is created on the Estate as debts or legacies, y^e charge remains. 2 Rep R. 349. bro ab. tit. "charge". 4 Co. R. 60. 1 Vern. 340. 345. 2 Vern 722. Stra. 25. Doug 323. 1 P. W. 397. Cro E. 423. Bay 40^a. 1 Mod 267. 2 Ib. 313. Pow 676. 7. Pre Ch 439. Rep 118.

By a late Stat. of C. if devisee or legatee being a child or grandchild of testator dies before testator, & no provision made of such contingency, the issue of devisee shall take as he & have taken. Stat. C. 548.

Waiver. A devise may also fail of effect by devisees waiving y^e benefit of it. The waiver may be Express or implied. Pow 442. 3.

The waiver is express, when devisee actually refuses to accept the devise. Pow. 443.

An implied waiver arises from some act of y^e devisee, from which it is inferred y^t he does not accept. Pow 443.

It is a general rule in Equity, that if a person have a claim upon part of what is devised, independently of y^e devise, & a claim to another part, under the devise, he waives y^e former, he waives the latter. [claim] Implied waiver. E.g. B. Acre is settled on A for life remainder to his son B. A devises B. Acre to a stranger & white acre to B. If B. insists on having B. acre under y^e settlement, he cannot have white acre under y^e devise. Pow 443. 454. 2 Vern 581. 252. 3. Talb: 176.

This doctrine of implied waiver is founded on y^e idea of a tacit Cond^n annexed to devises, y^t the devisee does not disturb y^e disposition, y^t testator has made. Pow 440. 6. 453. 4. Talbot 176. 2 Eccles. 14. 617.

and it is not necessary to give effect to the rule, that the thing devised be of the same nature, or of equal value with that, to which the devisee has a claim independently of the devise. For 450. 1 Ves 238. 426.

In such cases the D. will require y^e devisee to make his election. For 450. 3. 4. Vall. 176. 2 Ves. 14.

But, if the devisee is a creditor & not a mere volunteer, y^e rule does not apply. E.g. If one devises a part of his estate, for the payment of debts & devises to A. B. another part to which a creditor has a right, & the latter & title claim his share, & the debts devised to pay debts - for the estate devised to A. B. is y^e creditors. For. 460. 434. 8. 29. H. 412. 2 Ves 617.

So, if land, to which A has a higher claim than testator, is devised to B. by an instrument, not executed so as to pass lands, & a legacy to A. he may claim the legacy & land both - here the land cond^y does not apply, for testator has not disposed of the land land, as to y^e thing is no devise. For. 450 C^e 1 Ves. 298. 307.

But still, if there is an express clause in y^e devise that a legatee disputing y^e will, shall forfeit his legacy, his claiming the land, devised as in y^e case will defeat his legacy - for there is an express condition annexed to y^e legacy. For. 460. 462. 1 Ves. 12.

If testator gives a legacy to one, in satisfaction of a particular thing expressed, that will not exclude him from another benefit, the legislature may be latter is contrary to the testators will. E.g. to

Testators wife is entitled, under marriage agreemt to a portion in land, & another in money. He gives her a legacy in satisfaction of the money-portion, & devises the land to J.D. She may claim both land & legacy. Pow 403. 2 Ves 30.

And in all cases, in order to oblige devisee to elect (at ante) it must be clearly evinced, that ye devisee's taking both interests will defeat ye general intent of devisor. E.g. Testator having devised Blackacre to his wife immediately, devises to her white acre in way of remainder. This does not prevent her from claiming Blackacre in white acre. Pow 466. 4. Atk 430. 2 Vern. 365. L. Ray. 438. 1 Ves. 230. 2 Eq. C. ab. 301. 8 Vin. 244. So a wife may claim her marriage settlement, tho not devised to her, & a residuary Legacy.

A devise may fail of effect by the Testators performing in his lifetime, what it was the object of the devise to accomplish. E.g. Testator devised £400, to complete a building, & afterwards before his death, expended more than that sum on the house. His heir shall not have ye benefit of ye devise. Pow 470. 1 Vern 95.

So a devise may fail of effect in consequence of the Stat. 3 & 4 W. & M. c. 14 fraud. devises. Under this Stat. all devises of lands are void as to devisors bona-creditors. i.e. ye Creditors are entitled to satisfaction out of ye lands, of ye party fail. Heir & devisee sued jointly. Pow 471. 4. 2 Bl. C. 378. 3 Bac 27. 3 Atk 434. 2 Ves 125. 378. 1 P. Wms 129.

Before this Stat. devisees selling or alienating before action brot, says Powel held to the exclusion of creditors. Pow 473. Suppose no alienation. 2 Bla. 378. 3 Bac 27.

C.J. 1865.

This Statute is liberally construed. Doe 4 T.R. 205.

The general law relating to the settlement of the estates of deceased persons in C. gives Executors a preference to Devisees Stat. C. 16 § 22.

The Eng.h Stat. of Wills relative rights of creditors & devisees only. It does not relate to those of heir & devisee. Therefore, Land descended are liable to creditors, before Land devised. Devisee a purchaser. Doe 4 T.R. 435, 3 Co. 12.a.)

How far Parol Evidence may be admitted to control or explain a Devise.

Every instrument consists of matter of fact, & matter of Law. The former may be averred & proved on an issue in fact - & g. whether the instrument was executed - when & after execution it was altered &c. Doe 4 T.R. & Co 155.

But matter of Law is not the subject of an averment - not triable by a jury - ergo not provable as a fact - (Doe 4 T.R. & Co 155.) 2 d. Devise to "A & his heirs" what Estate A takes is a rule of Law, to be determined as a matter of legal construction. (Doe 4 T.R. - An uncertainty of the former kind is a latent ambiguity; of the latter, Patent. (ante.)

Hence, a gen.l rule, that testators declarations cannot be given in evidence to control the operation of the words used in his devise, or to give them an import, which upon the face of them they will not bear. This rule has obtained ever since devises were required to be written, & is found in the Stat. of Frauds. Doe 4 T.R. & Co. 155. Cro. Eliz. 145. 5 Co 68. 2 T.R. 130. 137. 141. Cro. Car. 2 Ves. 27, 2 Atk. 383.

Of Devises.

Testators declarations may apply to the devisee or to the person of the devisee. In both cases inadmissible. (Pow 478. 6 T.R. 671.) ie. when they relate to matter of law, viz. to matter of construction, upon the face of the inst.

1. As to the import of the Devise itself, e.g. If devise to "A & the heirs of his body, remainder to B. & the heirs male of his body, on condition that he or they shall not alien" &c. Parol evidence not admitted to prove who were meant by "he or they." Matter of Legal Construction upon the face of the devise. (Pow 478. 487. 8. 5 Co. 68. 2 Vern 98. Pow 500. 2 Ves 216. 17.

So if one devises to his wife for life generally, parol evidence not admissible to prove, that it was intended to be instead of dower. (Pow 480. 4 Co 4. 5. L. Ray. 438. 1 Eq. Cab 71.

So, where a devise was on condr. never to alien, matter by testator, were not admitted to prove, that the events which had happened were intended by him to amount to a breach of the condition. Pow 480. 1. 3. Vat. 232. 2 Vern 333.

So, where one having covenanted to sell his Estate to his son-in-law, for £1500 less than it was worth, devised £1500 to the son-in-law. Parol evidence not admissible to prove that the Legacy was in satisfaction of the covenant. (Pow 481. 2. Pr Ch 138. 1 Vern 231.

So on a devise to testators daughter, parol evidence of his intention, that the Land shd not be subject to her husbands debts was excluded. Pow 484. 2 P. W. 316. Vern 189. 2. 441. 216. 378.

2d. As to the person of the Devisee. Testators declarations are not admissible as to matters of construction

a law, e.g. devise to A. who died, testat. living – evidence not admitted to prove testators declarating that B. (A's son) should have what A. wd. have taken, if he had lived. Here no ambiguity, patent or latent – attempt to contradict the devise. Pow 485. Plowd. 345. Cro E. 422.

So, devise to the heirs of the body of A. – & if he die without issue to B. – testator dies, A. living – his issue cannot therefore take – & parol evidence of testators intention to give to A's children even during his life, not admitted. Pow 486. 2 Lev. 70. Pre Chy. 54. For whether or not his issue can take, he living is a Qu. of construction on the face of the devise. Pow 487.

So where testator having mentioned two women, devised to "her", parol evidence not admitted to shew which of the two were meant. Pow 500. 2 Ves. 216. 217.

But as to what are called (ante) matters of fact, i.e. as to latent ambiguities, the rule is, that parol evidce is admissible to explain them, if the matter averred stands with the words of the devise. Pow 487. 8. 495. 2 Show 55. 2 Ves 216. – Rule the same as to C. L. conveyances. Pow 487. 8, but not to contradict the words. Pow 523. 4. 50. 512. 2 Ves 216. Salk. 240.

Thus, if one devise or grant to his son A. he having two sons of that name, parol evidence is admissible to shew that the younger son was intended. The evidence stands with the words." Pow 488. 9. 56. 68. 5 Co 155. 2 P. Wm 137. 1 Ves 23. – Latent ambiguity e.g. that testator supposed ye. devisee to be dead – his declarations cannot be proved semb. 6 T. R. 671 – vid. Pow 495. 6. 7. 2 Ves. 216. 218. 1 P. Wm 674. So, if a devise were to A. of B. there being two, Pow 490. 2 P. W. 137. 1 Ves. 231. Pow 406. 7. 1 P. W. 674. So

So, devise to A. of the manor of B. he having two - parol evidence admissible to prove which was meant. Pow 488. 9th. 86. 185. "Sandy will," &c. Bac Ely 472.

So, parol evidence has been admitted to prove, whether an instrument was intended to be a deed or a devise: Pow 490. 14. 3 Rc 6. 310. 1 Mod. 87. E.g. that directions were given to make a will. -

So if a devise is made to A. (there being a later Son of that name) evidence is admissible to prove that the Testator did not know the father. Pow. 492. Sal. 7. 6 Mod 199. 1 Atk 411. 2 Ch. R. 136.

If devisee is wrongly named, still if sufficiently described he may be proved, by parol, to be the person intended - Pow 337. 340. 405. 407. 498. 499. Co Lit 3a. 8 vin. 19; 11 Co 21a. 1 Burn 293. 3 T. R. 671. - Not so as deeds, said. Pow 498. Bac Max. 107. Qu. 11 Co. 21a.

So, devise to A's 4 children, he having 2 by B. & 4 by C.) -, parol evidence good to shew that the 4 by C. were meant. Pow 494. 5. 521. 2 Ves. 216. - Parol declarations of the Testator proved. Pow. 495. 7.

But a devise to "one of the sons of A." he having seven or 2 is void - parol evidence not admissible - Patent ambiguity - matter of Legal construction. Pow 488. 490. 1 Co 155. 3 Ely. Ch. 99. 2 vern 624. 5.

If the name given to devisee as, Chris exclusively is the person, & the description exclusively to another, it may be proved by parol that the wrong name was inserted by mistake Semb. 3 T. R. 671. Pow 498. 9. 1 Atk. 410. - but any other proof be admitted in such case.

So

So, where testator gave a legacy a name which the news bore, parol evidence allowed to prove that testator knew such a person & used to call her by a nickname. Pow. 499. 2 Atk. 240.

So where a devise was to the poor of A. in ye county of B. and A. was not in the county of B. - parol evidence admitted to ascertain ye parish. Pow. 499. 2 Eq. C. Ab. 416. 14.

But, if the person wrongly named, is not at all described, no evidence admitted to shew who was intended - e.g. "Diana" for "Mary" (Pow. 500. 2 Ves 217. 18.) The evidence, to suppose, must not "stand with the words." - Rule. It not to be proved that ye insertion was by mistake? vid. Pow. 523.

If words of equivalent import are used, parol evidence admitted to direct ye application of them. This is done not so much for the purpose of furnishing a construction, i.e. an explanation of the effect & operation of words understood; as an interpretation (i.e. an explanation) of terms, not certainly understood - However some of the cases go further - post

e.g. on devise seniori puero - evidence admitted to shew the age (this) was intended, so that a daughter might take. Pow. 340. 446. 2 Eq. 337. Mo. 104. 5. Vin. Ab. 32. (Page

So where a devise is to testators "nearest relations" parol evidence admitted to shew, that he knew certain persons answering that description, but no further. His declarations not provable. Pow. 499. 8. 1 Ves. 231.

But in these cases evidence is never admitted to give words a sense, which they will not bear on the face of the instrument, - e.g. The word son sometimes

sometimes construed to mean a grandson, (but not if there is a son living. 2 Ves. Pow 678.9.) But if it appears upon the face of the devise, that the word was intended to apply to a son only, no parol evidence admitted to show, that the word Son was meant to apply to a grandson. This wd be to contradict the legal Construction. Pow 501. 678 n. 677.3 Mod 318. 1 Vent 340. Hay. 408. 2 Ves. 243. 2 Show 63. 2 Vern 106.7.) as if there is a legacy in the same instrument to the "Grandson" Pow. 678.9.

Parol evidence not admitted to supply any thing not written. e.g. £200. to a Charity according to the will of Mr. ___ Evidence not admitted to show whose name was intended to fill the blank. Pow 501.2. 2 Eth. 240. Pow 523. 8 Vin. 195. 2 Eq. C. ab. 415. 5.

So where testator gave directions to have all his personal estate given to his Exors, but it was omitted by mistake, Evidence of y. mistake not admitted. Pow. 523. 8 Vin. 195. 2 Eq. C. ab. 415. 5.

Cts. of Law & Equity have also admitted proof of extrinsic facts to explain words of Equivocal import as to quantity of interest devised i.e. where y. proof "varies with y words". Pow 502. 521.

1. Proof of testators circumstances, has been admitted to ascertain the quantity of interest, y. import of y. terms being equivocal. — E.g. Devise of testators "whole Estate" to Exs in paying his debts &c. Evidence admitted to prove, that the personal Estate was insufficient to pay them & that then, a fee must pass by y. devise

might sell. Pow 502. 4. 7. 8. Stra. 281. 293. 3 Keb. 49. – It is settled, that "estate" carries a fee, unless restrained by other words. 1 T. R. 412. 2 Id. 557. 4 Id. 93. 5 Id. 562. 6 Id. 34. 8 Id. 67. 582. 2 Ves. 50.

So where the Dev. was upon whether equivocal words, whether a legatee of testators personal estate took it absolutely or for life only (she being testators wife) evidence admitted to prove that it was insuff^t to support her, unless she used the principal or stock. Pow 507. 8. Pre. Chy. 71.

2. Proof has been admitted for same purpose, as to the value of the property devised. Pow. 518. 506. 7. 513.

E.g. Devise of all testators "land" to A. he paying to B. & C. £.100 in a year, out of the land – Proof admitted that this sum exceeds y^e annual profits of the land; to shew that a fee was intended. Pow. 506. 7. 513. Prec. 479. 2 Eq. C. ab. 298. Bur. 1890. Pre. Chy. 71.

Now regularly a devise of "land" charged with the paym^t of ~~debts~~ a gross sum, carries a fee of course, & such proof unnecessary. 3 T. R. 356. 5 Id. 13. 8 Id. 1. 503. 2 Atk 341.

3. Proof admitted as to the condition of testators family to ascertain the application of a term, which may be a word either of purchase or limitation. Pow 504 518. E.g. Devise to A & "his Children" or "his issues". Proof admitted as to the fact of his having children or not at the time of the devise. – If not, an estate tail is created. Pow 505. 6 Co. 17. Doug. 309. 10. 1 Ves. 227. 231. 1 Bulstr. 219. 1 Ld. R. 456. 460. 4 T. R. 294.

4. Evidence admitted as to the state of testators

property, to ascertain the meaning of words, not in them-selves equivocal, but which when considered with ref-erence to the state of his property, will bear & require a construction different from that, which they prima facie import. e.g. "I devise the house called the Bell Tavern to A." Proof admitted that A was tenant in tail of the house, & that devisor had only the revers.ⁿ in order to shew that an estate in fee was intended, Pow. 508 9. Sal. 234. Ray. 831. Holt 744. 1 Bro. P. C. 108.

So in Fonnereau v. Poyntz 1 Bro. Ch. 472. Evidence admitted to create an ambiguity, where there was none on the face of the instrument. Pow 523. &c.

Hence the proof "stands with y^e words," tho not with y^e meaning which they prima facie convey.

But no averment, that does not "stand with the words," can be admitted. Thus where one devised "to the Children of A." (he having 6.) evidence not admit-ted to shew that 4 only were intended. Pow 524. 494.5. 512. 2 Ves. 216.

So where testator devised the residue of his estate to his Ex^ors, one of them being indebted to him £3000. evid. not admitted to shew that his intention was to forgive the debt. For the residuary clause included it. Pow 527.3. Talb. 240. Prec. 120. 2 Freem. 32.

So where the residuum of testators property was not disposed of, evidence not admitted to shew that testators intention was, that his Ex^or sh^d not have it, Pow 524. 2 Bro. 426.

But parol evidence, even of testators declarations,

is admitted to rebut an Equity, founded on implication - not to establish it. "An Equity" means, in general, an equitable claim. But the meaning of the rule as here applied to the case of a devise is this;

That where from the face of the devise, by reasonable inference, which is contrary to the legal conclusion arising from it, parol evidence is admissible to rebut or control the former, which is in effect to establish the latter. Pow 524.

E.g. If land is devised to an Exor. for payt. of debts, the surplus belongs at law to the Exor. - In Eq. there is a resulting trust as to the surplus to the heir - i.e. Exor is trustee of it to the heir. (Pow 526. 526. 8.) In this case evidence is admissible even of testators declarations to shew that the Exor was intended to have the surplus. (Pow 526. 5. 6 Ves. Cas 196. 2 Vern 252. 677. Talb. 79. 240. 1 Ves. Sr. 1324. 1 Ves. 323. 2 Eq. C. Ab. 506.)

So where testator bequeaths £250. a piece to A. & B. and afterwards by a codicil directs his Exors to pay them £250. each - evidence admitted to shew that both sums were intended to be given. Pow 526. 2 L. Ray. 1324.

So where testator gave considerable Legacies to his heir from which the inference in Eq. was that he was not to have the residuum, evidence admitted, (testas Declarations) that Exor should have it. Pow 527. 8 2 Vern 677. Talb. 79.

Held upon the ground that the evidence offered does not contradict the writing, parol proof has been admitted to shew that a devise was intended as a personal

Of Wills.

of a previous agreement. E.g. Agreement by marriage articles to settle £100 per ann. on the wife - H. devises to her £100 per ann. - Evidence admitted to prove, that devise was meant as a performance of the agreement. Pow. 529. 4th Ves. 323.

Parol Evidence admitted in all cases to construe Wills. e.g. One devised his real Estate to his Exor, on trust to charge the Estate with an annuity, devised to A. because the Exor promised to pay it. Evidence admitted. Pow. 538. 1. 2. Vern 506.

Of Revocations.

Wills and Devises are "ambulatory" till the testators death - i.e. not consummate. ergo revocable by testator. Pow 550. 4 Burr. 2512.

Revocations may be considered under two general views. 1st As they stood at C.L. i.e. before the 29th Stat. of Frauds - 2d as they stand under that Stat. Pow 532. 629.

I. Revocations at C.L. Revocations at C.L. are of two kinds: 1. Express - 2d Implied. Pow 532.

1. Express revocations at C.L. might be by writing, or by parol - Firstly by writing as by a Codicil, or subsequent will, expressly revoking a former. Pow 532.

Secondly By Parol - As if one, having made a devise expressly declares "I revoke my will", or uses words similar in point. (Pow 652. 533. Dy. 310. Plot. 615. Cro. 110. 445.

But in this case, it must be clear, that the words were spoken, animo revocandi - Therefore where testator said that because the Devisee did not visit him, &

shall not have his land" (but making no express reference to his devise) does not revoke. Pow. 533. Cro. J. 115. Cro C. 51.

So, words importing an intention to revoke in future, do not work a revocation at C.L. Eg. "My wife shall not stand", or "I will alter it". Pow. 533.4. Cro. J. 497. Moore 487. Cro E. 306. — Same rule holds, since the Stat. of a devise intended to be proved in writing &c. sem. 2 East 488, 495.

2. Revocations at C.L. may be implied. An implied revocation is by some declaration or act, furnishing ground to presume that testator's intent to devise, must be changed. Where express revocation is implied — a revocation in Law. Pow 532.4.5.

E.g. If one, having devised to a Stranger says, animo revertendi, "My son shall be my heir." Pow 535. 1 Vin. 7. 1 Keb. 203.

Acts of division amounting to a revocation in law, may be by writing, or in fact. Pow 535.554.

First, by writing; as if one having made a devise, afterwards makes another inconsistent with, but not expressly revoking it. — revocation in Law. E.g. One devises his land to A & by a subsequent will to B. — Or, he first devises all his estate to two & afterwards to one of them. Pow 535.6. 3 Wms. 511.12. 3 Mod. 206.

Said, however, that if one devise land to A. in a subsequent part of the same instrument, whereby the same land is to B. & B. take jointly (1 Pow 444. 2 Mod 374.5.) Not so, as to a specific legacy, nor be true the latter words (2 Atk. 345.)

But a subsequent devise (not containing express words of revocation) does not revoke a former one, unless inconsistent with it. ergo, if mere fact, that a later devise recites the former by a fine will not warrant a Ct. in deciding, that a former one is revoked by it — for the second may recite to a different subject matter and not confirm the former. Vow 536. 541. Harbr. 374. Show P.C. 146. 3 Atk. 203. 6 Com. Dig. 90. Sug. 592. 3 Wils 497. 2 Bl. R. 937. 1 Bro P.C. 344. Comp. 87.

And tho it is expressly found that the second is different from the first, yet if it is not ascertained in what the difference consists, the first is not revoked. Vow 533. 541. 3 Wils 497. 2 Bl. R. 937. Comp. 87. 1 Bro P.C. 344. Cumque qua supra. 2 East 487.

But if it were found, that the second devise was inconsistent with the disposition made in the first, it. 2d. is a revocation. Sem. Vow 540. 4.

So a codicil, inconsistent with the preceding devise, to which it is annexed works a revocation: e.g. Devise of 30 acres to A. by a subsequent codicil giving White-acre to A. Blackacre is given to B. Vow 541. 542. 3 Atk 552 12 vs 32.

But a distinction is taken between the revoking effect of a codicil & that of a subsequent will: this:— That a codicil being part of the will, & not in its nature intended as an instrument of revocation does not revoke, except precisely in the degree of repugnancy. Vow 543. 4. Swinb. 15. — e.g. Devise of Land to 3 trustees to a charitable use — by a codicil it is devised to the

same trusts to S. i.e. to the same 3 ℓ 2 now. The trust not revoked. Pow. 544.5. 1 Vern. 178.186. 1 P. Will. 444.

(Whereas, it is said by Powel, a subsequent will or devise varying a disposition, made in a former one, is a total revocation. (Pow. 543. 1 Vern. 187.) Qu. is not this proposition too general? — Note the case where one devised lands in fee to his sons, & by a subsequent devise gave the same land to his wife for life. Pow. 18.19.537. 540.524.627.8. 1 Cro. E. 421. 1 Vern. 187. 3 P. W. 345. n. Comyn 87.

If one makes a second devise inconsistent with a former one, under a false impression as to a matter of fact, which furnishes the motive to make the second, & the supposed fact is, after his death, found not to exist; the first is not revoked. E.g. one devises land to A. & afterwards by another instrument, reciting that A. is dead, devises the land to B. — if A is alive he will take. Pow. 540.

But, according to Powel, a false impression will not avoid the second devise, unless it is the consequence of deceit, practised upon the testator. (Pow 546.7) Qu. No actual deceit, i.e. no wilful misrepresentation supposed in his own examples. He seems from his E.g's. to mean by "deceit," nothing more than misinformation & consequent misapprehension as to matter of fact.

For the case which he distinguishes from the case of deceit is one where the misapprehension is as to matter of law only. viz. It being doubtful whether according to the rules of Law or Equity I may devise my Estate to the separate use &c therefore &c. (Pow. 547.) — And in this case, Pow. supposes the second devise good).

For

Of Devises.

If a former devise is revoked by a subsequent one, on the principle, that the latter is inconsistent with; former: the implied revocation, as well as y^e instrument containing it, is annulated by the testators death. & so the latter being revoked, y^e former stands. Pow. 549. 4 Bur. 2512. Park. 8. 479.

But, (semb;) if the second devise expressly revoke the first, a revocation of the second, does not reestablish the first, if it remains in existence. Pow. 551. 4. Comp. 53. Doug. 40.) Because the revocation is express an independant, substantive act, by which the former becomes immediately void. Ld. Comp. 92. 4 Bur. 2512.

Secondly, tis also accounted an implied revocation may be by matter in fact. Pow. 554. 532. 535.

As 1.- By a total alteration in the relative circumstances of devisor - 2. By an actual or intended alteration in the estate devised. Pow 554. 565.

1.- No alteration in the devisors circumstances except that of marriage & the birth of a child has, as yet, been decided to be a revocation of a devise previously made (y^e devisor being a male) - But such an alteration of circumstances is a revocation. Pow. 554. 4 Bur 2184. 2184. 1 P. W. 304. 1 Eq. Ca. ab. 413. Doug. 35. Dick. 592. 2 Vez. 441. 2 Atk. 346. 1 Wils 243. 1 vers 191. Ld. under special circumstances. 5 Vers. 663.

So the child born posthumous. 5 T. R. 44.

A subsequent marriage only, or the subsequent birth of a child only, not suff: semb. cas. supra) to revoke a man's devise.

But in Com. by a late Stat. y^e Subs. of both of these

child more is a revocation, if no provision is made in the devise &c. for such a contingency Stat. C. 548.

The reason of the rule is generally said to be, that upon such a change of circumstances, the testator is presumed to have changed his intention, as to the disposition of his property, Fonb 555. 557. 556. Doug 31.

Hence any Evidence, written or parol, is admissible to prove, that his intention was not altered - i.e. to rebut the presumption. E.g. his own declarations (Fonb 556. n.; Eq. C. ab. 413. Doug 31, 35.; 2 Ld. Ray 441. 2 Ld. Raym 1440. 864. Bl. 276. 1 Bac. 522. 2 East 530, 543. n.) Where testator devised his real Estate in fee, to the person whom he afterwards married, & gave only a legacy to his brother, such a change holden not to be a revocation, Fonb 556. n. 1 Eq. C. ab. 413.

But quere, whether this is the true reason; For in the case of a subsequent marriage & birth of a posthumous child the devise is revoked (Bacon) tho the conception was unknown to the testator. And E. Contra, if he knew of the Conception at his death, our abortion should afterward happen - there will be no revocation, yet his intention cd. not be influenced by the fact in the former case, but in the latter it might be (Bac. 58. g.) And what legal effect can a mere intention to revoke have, if there is no actual revocation. 2 East 541. 2.

Final, then is the principle? answering to the reason then is, that condition annexed to every devise, express or implied, that the testator does not then intend to make a total change shd happen in the circumstances, Bac. 58. 63. This principle is explained by

Lord Ellenborough. 2 East 541. 2. This idea at any rate, reconciles the authorities.

But there has been no case yet decided, in which marriages &c have been holden to be a revocation, except upon the disposition has been of the testators whole estate. Pow 550. 556. 7. 2 East. 541. 2.

And it seems, that if the testators subsequent wife & children are duly provided for, either by the devise itself, or by his dying intestate in part, the presumption of a change of intention does not arise from y^e marriage &c. or the tacit condition is not annexed. Pow 556. 7. 560. 1 Eq. Ca. ab. 413 Doug. 33. n. 10.

And marriage &c will not revoke a devise made in contemplation of such events, & providing for y^e future wife & children. 2 East 330. Doug 39.

But if a feme sole, having made a devise marries, it is on Eng^t principles clearly suspended during coverture, so that if she dies before y^e husb it is revoked. For it is of the essence of a will or devise, that it be in y^e testators power to revoke or confirm it. But in Eng^d a woman during coverture, can do neither. Pow 563. 4 Co 61. 1 Salk 175. 181. 1 Bac 291. 4 Mod 160.

But if the wife survives y^e husb, & thus becomes again sui juris, will it revive of course? According to Powell, opinion it will. Pow 564, 2 Mod 343. 2 Ld. 4 Bac 251 Aug^d

In Con. it is clear that the devise is not a fee in these two cases any more than that of a man would be - for by our Law, a woman may make a devise during coverture, (note.) (See 2 Ld. decided contra in Ct. of Errors in 1805. Field v. Brainard.

But an alteration in the personal capacity of testator, tho' such as renders him incapable of making or revoking a devise, does not in itself work a revocation. For upon this change he has no will, no power of revoking. Pow 564.5. 775. 4 Co. 61. ... 1 Vern. 108. 1 Eq. Ca. ab. 234. Nor no presumed change of intent. Qu. does not the same reasoning apply to ... of Coverture! (as. ...) -

2. An act in pais, amounting to an implied revocation, may consist in an actual or intended alteration in the estate devised. Pow 565. 554. 532.

First, of an actual alteration.

In these cases the revocation is y^e consequence of a positive rule of law, the intention of testator not regarded, nor founded on any presumed change of intention. Pow 565. 607. 582. 2 Atk. 577. 1 Bos & P. 599. (Secus in the case of revocations effected by an intended alteration. Pow 565. 607. 606. 1 Bos & P. 594. ... 510.

The positive rule, or principle referred to is this; that as the devisor must be seised (at the inception of the devise) of the estate devised, so the estate must remain in the same plight, till its consummation. Pow 184. 6. 566. 611) i.e. it must in contemplation of law have been in his seisin & remained so, ut supra. 1 Bos & Pul. 576. 1 Vern. Ch. 401.

Hence, any alteration in the estate, (between the inception & consummation of the devise) which puts it in a different plight works an implied revocation. Pow 566. 1 Bos & P. 576. ... 2 ... 13.

Such

Such alteration in the estate may be, by act of the devisor - by act of a stranger - or by act of Law. Fow. 566.

First, by act of the devisor: E.g. sale of the land devised to a 3d. person, will revoke pr. devise. Fow. 567.

So if testator having an absolute estate in land makes an alteration in the legal estate only, retaining the beneficial interest, (or equitable estate) that revokes a prior devise of the land: E.g. One having devised land makes a feoffment of it to a stranger, to the use of himself in fee. Devise revoked, for he hath by estate by the new limitation as a new purchase. Fow. 567. 5. Rol. 615. - (2 Ld. Vid. Dy. 143. a. b. 74. 1 Bos. & Pul. 592. 1 Thom. & J. 3. Howell 253.) See also 1 Williams 311. Fow. 599, 600. 10 Bos. & P. 576. 7 T. R. 349. 2 Eq. Ca. Ab. 417. 4 Burr. 1960.

So if one having devised land conveyed it to others & they take a reconveyance of the same land. Fow. 567. 1 Rol. 615. Dy. 143. b. Co. 40. 10 Bos. & P. 576.

The rule is the same tho the conveyance is by lease & release in which case the actual possession is not changed. Fow. 568. 2 Atk. 376. 10 Bos. & P. 576. Upon Ed. Com.

So when one, having devised land, makes a marriage settlement limiting it to himself & his children, & dies & settlement, remainder to his own right heirs. Fow. 569. Prec. Ch. 440. 7 T. R. 349.

So a recovery suffered of land, to the use of the testator will revoke a prior devise of the same land. Fow. 570. 2. Atk. 325. 3 Wils. 6. Bro. P. C. 177. 2 New R. 401.

The preceding rule applies as well to equitable as to legal estates. As if mortgagor having devised his e.

of redemption, conveys it in trust for him. &c. the devise is revoked. Cou 572. 3. 2 Atk. 741. 579. 803. Show. P.C. 154. Eq. Ca. ab. 411. 2 Freem 202. 4 Bur. 1901. Doug, 722. Cr.

And an alteration in y. estate devised will operate as a revocation, even tho the alteration made be necessary to give effect to y. devise. E.g. tenant in tail having devised, conveys to J. S. for the purpose of having a recovery suffered to the use of himself, in fee. The recovery is suffered but the devise is revoked. Cou 583. 3 Lev. 108. 3 P. W. 163. 2 H. Bl. 523. 7 T. R. 406. 2 Vez Rep. 401.

So if a man covenant to levy a fine to the use of such persons, as he shall name in his will & make his will, & then levy a fine in pursuance of his covenant, y. will is revoked. Cou 581. 1 Rol. 614. 3 P. W. 176. Vat. 341.

And the rule is y. same tho the alteration made, is expressly declared to be none, for the purpose of giving effect to the devise provided the devisee is entitled as a new purchaser. Thus where one made his devise of a manor, & then made a feoffment to y. uses of such persons as he had declared in his will, bearing date after the feoffment was adjudged a revocation. Cou 582. 2 Atk. 574. Moore 787. 1 Rol. 614. 2 P. C. 68. 7 H. 399. - vid Cou 656. that the reference of the feoffment to y. devise gave it effect, that operating as a republication.

Still further; if a man seised in fee, but supposing that he has only an estate tail, suffers a recovery to confirm his will, it is revoked. Cou 582. 3. 3 Atk. 503. 4. 2 H. Bl. 523.

opus

Of Devises.

And a Specific devise of a Lease for Lives is revoked by a Subsequent Surrender & renewal of it. Pow 583. 4. 10 Pr. Wms 575. 2 Ves. 168. 2 Vern 209. 3 P. Wms 163.

And the rule is the same as to Leases for years which are renewable, E.g. One devises a Lease he has for 4. & afterwards surrenders & takes a new Lease of ye same Land. Pow. 586. 2 Atk 593. 2 Ch. Cas. 319. 2 Vern. 418.

But Leases for years being chattel interests, may pass by devise, notwithstanding a Subsequent renewal, if proper words are used for that purpose. E.g. I devise all the Estate &c that I shall have in such a Lease at my death. Subsequent renewals does not revoke. Pow 589. 590. 3 Atk 174. 177. 179. Sal. 237. 10 Pr. Wms 575.

So if the renewed Lease is not compleat at the Testators death, ye devise is not revoked by the surrender. E.g. When Lyons seal was not affixed, till after Testators death. - no revocation. Pow 592. 3. 2 Atk. 593.

And when the revocation depends on ye single fact of an alteration in the Estate, (independantly of any supposed intention to revoke) there must be an actual & substantial alteration, or no revocation. Thus formerly held, that if one devised Land in fee, & afterwards covenants to convey it to a Stranger, devise was not revoked by the Covenant. Pow 593. 1 Ros. 615. 1 Bl. C. 760.

But now, as Cts of Eq^y Consider an Executory agreement to convey Land, as an actual Conveyance; Such a Covenant or agreement will in Eq^y be deemed a revocation if Covenantee has a right to a specific performance. Pow 594. 5. 2 P. Wms 321, 324.

Devises.

But a devise of the equitable interest in a trust est. is not revoked in Eq. by a change of the trustees. Eq. Cestuy que trust having devised, causes his trustees to convey the lands to the same uses. No revocation in Eq. - nor alienation in the thing devised, i.e. of equitable estate. Pow 596. 6. 1 Ch. R. 23. 2 Ch. 109.

So if one having contracts by articles for the purchase of land, devises it, & then completes it, this is no revocation of equitable interest not actual. It is only "taking the estate alone". Pow 596. 8. Doug. 691. 694.

So if mortgor having devised, pays off the mortg & mortgee conveys the legal estate to a trustee, in mortgor this is no revocation. Doug 686 n 710. Pow 597.

So laid down as a general rule, that if one having an equitable interest in fee, devises it, & then takes a conveyance of the legal estate, devise is not revoked. No alteration in the estate devised. Pow 599. 1 Wils 311. 3 P. Wms 370. 2 Vern 679. 1 Rol. 616. 70. B. 417 m.

When several instruments, taken together, constitute but one conveyance, a devise made in the intervening time, betn the execution of the first, & the completion of the last is not revoked - for all the parts take effect by relation from the first instrument - Eg. Conveyance made to suffer a recovery - then a devise - afterwards recovery completed. Pow 600. 1. 3 C. R. 251. 2 Bur. 1131. 4 Bur. 1902. 3 C. R. 700. 705.

A partition between tenants in Common or Coparceners confined to that object, is no revocation of a previous devise by one of them - Nor an alienation in devise as

estate.

Estate - it merely ascertains what before belonged to him. Pow 602. Bay 240. 3 P. W. 170 n. B. 3 Rib. 357. 4 Ed. 90. Co.

(But if the deed of partition extend to any other object than that of partition merely, it will revoke a previous devise. E.g. If it contains any further disposition of the Estate. (Pow 603. 1 Wils 309. 3. 4 Tk 742. 745. 758.)

Note, When one has made an actual alteration in an Estate before devised, no parol evidence is admissible to shew that he did not intend to revoke. (2 76. Bc. 516. 3. 4 Tk 741. 2 Brs P. 417, 595.) For the revocation is not founded on a supposed intent to revoke - it is an arbitrary conclusion from positive law - presumptio juris de jure.

Secondly. Acts in pais amounting to an implied revocation of a prior devise, may be by an intended alteration in the Estate devised - as if Devisor attempts a disposition which is ineffectual either for want of formalities, or of capacity to take in the person to whom it is made, &c.) (Pow. 605. 565.

E.g. One having devised (and) makes a deed of feoffment of it; without livery of seisin (Pow 606. Moore 429. Popk. 103. 1 Roll 615. 3 Atk 72. 3. 803. 1 Bc. Rd 49.) - Or having devised a reversion makes a grant of it, but the tenants never attorn (Pow 606. 1 Rol. 615.) - Or having devised conveys by deed of bargain & sale, not enrolled in the 6 months - (Pow 606. 7. 1 Rol. 615. 1 Brs. 178. 180.)

For such attempts to convey, imply an intention to revoke. (Pow 606. 7.

(Revocations thus effected, being founded on presumed intent to revoke (ante) - & inference may be made

by parol Evidence. (Pow 607.8.) as where devisor on executing a Deed of Feoffm.t to his own use, & delivers his intent not to revoke. (Pow 608. Dw. 76. Godb. 132.

So by an intended alienation which becomes ineffectual thro an incapacity to take in the person to whom &c. (ante) - E.g. Tn having devised to A. a Term, devises to a Corporation - this is a revocation, tho the Corporation cannot take. (ante.) - 1 Rol. 615. 2 Ch. Ca. 35. 1 Bro. P. C. 450. 3 Mod. 190. 10 H. 237. - (post.)

So if a subsq.t ineffectual grant to one, who cannot take - E.g. Grant of devisors whole estate to his wife Pow 610. 3 Atk 72.

So an alienation of p. estate devised, working a revocation, may be by p. act of a Stranger (ante). Pow 611. - 184. b. 566. 674.) as if one having devised is disseised, & dies before re-entry. Pow 611. 184. b. 566. 674. 1 Rol 616. Holt 748. 11 Co. 51. a. b. - For the effect of disseisin, & the distinction see ante page

But a Stranger cannot revoke a devise by tearing or cancelling it, if it remains legible. Pow 612. 652. 2 Vern 441.

Again - an alienation of the estate devised amounting to a revocation may be by mere operation of Law: E.g. Devises made, but not consummated before p. Stat. if uses were revoked by that Stat. Pow 612. Dy. 142.a. 143.b.) 1 Rol. 616. 2 Vern 419.

A Devise may be revoked absolutely or conditionally, in whole or in part only. Pow 614. Dw. 76.

Absolute & total revocations already considered -

Of Conditional & Partial Revocations. — A. mortge in fee, tho at Law an absolute revocation of a prior devise, is now considered in Eqty. as only a conditional revocation pro tanto — i.e. to the amount of the debt secured. — So that if Devisee will pay the debt, he may take the Land. (Pow. 614 &c. / Rol. 617 Dy. 143. b. n. / Vern. 329. 2 Ch. C. 154. Sal. 158. 3 Atk. 748. 805. 2 Ray. 968. 2 P. W. 329.) — So, if the subsequt disposition were an absolute conveyance in a creditor, that he might sell the Land, to satisfy the debt & account with the Testator for the surplus. (Pow 619. & 2 Atk. 148. 272. Bro. Chy 32. 2 Vern. 241. 3 P. W. 344. 1 Eq. Cab. 410. 2 Freem. 117.

But a mortge for years only, is even at Law only a revocation of a devise in fee, for the term — & reversion passes — In Equity it is only a conditional revocation pro tanto — so the devisee may take immediately on paying the debt. (Pow 617. 8 Vin. 156. pl. 7. 1 P. R. 410. 3 Atk. 743.

But a Mortge whether in fee or for years, is an absolute revocation as well in Eqty as at Law of a prior devise, if made to the devisee — Devise & mortge, inconsistent — Same person mortgor & mortgee — (Ca. of Lessee next pa.) — (Pow 618. 619. Bro Chy. 514.) — Contra 5 Vin. 656. that even a mortge in fee is no revocation. 3 Atk. 417. 600. "Mortge." p. ___

Revocations pro tanto may operate, by diminishing either the quantity of interest, or the subject — after devise. (Pow 623. 4.

1. Thus, if one devise in fee & afterwd. lease to a Stranger for life, the devise is revoked only quoad the Estate for life — i.e. during the life of Lessee — not as to the fee. (Pow 624. 5. / Rol. 616. Bro. C. 23. — in fine.

Of Devises

If one devise an Estate on condition subsequent expunge the cond.: the Cond. only is revoked, & the estate devised is absolute. Pow 624.

So if one devise to A. in fee, & afterwards by a subsequent instrument, make a devise of the same land to B in tail. The second devise is a revocation of the former to the extent of the difference between the two. (Pow 624.5. Cowp 90.

But tho a lease to a Stranger is only a revocation pro tanto of a former devise (supra) yet a lease to devisee of the land devised to commence from devisors death is a total revocation. Devise & lease to commit. — One person to be at the same time, devisee & devisee. Pow 626. Cro J. 49. Case of mortgagor supra. vide 5 Pro Ch. 556. 3 Ves. 417. Contra. Last Page

But a lease to Devisee to commence in devisors life time, is no revocation (Qu. not for the time?) for it may be determined before devisors death, & so stands with the devise. Pow 626. Cro J. 49.

2. As to revocation diminishing the subject matter. If one devised 3 manors to A. & then revokes as to one of them, the devise remains good as to the other two. One devises Lands to his daughter, & afterwards on her marriage, settles a part of the same land upon her. the devise as to the residue remains. (Pow. 627. 8. 1 Rol 617. 2 Vern. 720. Eq. C. ab. 412. 2 Ves. 771. 12. 2. Atk. 268.

III.dly Of Revocation under the Eng.h Stat. of Frauds. 29. Car. 2.

This Stat. enacts "that no devise &c. shall be revoked "otherwise than by some other will or codicil in writing "or other writing declaring the same (or by burning tearing "cancelling or obliterating the same &c.) or, unless the same is "altered by some other will or codicil or other writing "signed in the presence of 3 or more witnesses declaring "the same" &c. Note the requisites prescribed in the devising clause. Pow 67. 8.

Held that this clause of the Stat extends not only to devises of land, strictly so called, but also to legacies or sums of money charged upon land. Both to be revoked in the same way. Pow 630. 2 Atk 272.

It does not affect implied revocations i.e. such as are effected by a subsequent inconsistent disposition. marriage & birth of a child &c. It relates to express revocations only. (Pow 630. Garth 81.) The former remain as at C.L.

Revocations under the Stat. then, may be by some other will &c. (as prescribed in the first branch of the clause) by burning &c. or by some other will &c. (as prescribed in the 3.d branch.) Pow 631.

In providing the two first modes of revocation the Stat seems to be only declaratory of the C.L. except that the words "will or codicil," in the first branch of the revoking clause, are construed to mean such a will or codicil, as wd be sufficient to pass lands within the devising clause. (Pow 67. 8.) For after the last

devising clause, a will of Land, not complying with it, would be void: Therefore not a will of Land. Pow. 632.

Whereas the instrument contemplated by the last branch, not being referred in construction to the words "will" &c in the devising clause, is construed to be an instrument of revocation, merely - Ergo - not requiring the solemnities, prescribed in the devising clause. - Consider first & last branch together.

Hence a distinction between an instrument intended merely to revoke a prior devise, & one intended to make a new disposition of the same Land, & also to revoke: -

The former, i.e. one intended, merely to revoke, will be effectual if it comply with the requisites, prescribed either in the devising clause - or with those prescribed in the third branch of the revoking clause - (true the requisites -) Pow. 647-8.

For if it comply with the requisites in ye devising clause, it is effectual, according to the first branch of y. revoking clause. Pow. 631. 647. 8, 654.

And if it is attended with the requisites in the third branch of the revoking clause, it is good according to that clause. Pow. 647. 8. 1 P. Wms. 643. 5. Ow. Chy. 467. 10 Mod. 467, 8.

But e, Contra: If the latter instrument is intended to be both a disposing & revoking instrument, it will not be effectual, unless it conform to ye devising clause; i.e. attested in the testators presence &c. For the intention is, to give to y. second devisee what is taken from

from y^e first — or rather to take from y^e first only what is given to the devisee. But nothing is given to y^e revocation — Pow. 645. 632. 3. q. 3 Wilb 288. Saith 74. 1 P. W. 343. Prec. Chy. 543. 2 Vern 741. 2 Atk 272. 1 Eq. C. ab. 409.

But a devise to testators heir at Law, tho void, revokes a former devise, if duly executed. 1 Wms. 17.

But a disposing & revoking instrument need not comply with y^e requisites of both clauses — If it conforms to y^e disposing clause, the revoking words are effectual within the first branch of y^e revoking clause. Ibid. If good, as a disposing instrument, it will be effectual to revoke (impliedly) without words of revocation — i.e. it will revoke as at C. L.

As to revocations by burning, cancelling, tearing & obliterating: revocations thus effected, remain as at C. L. — Pow. 631.

To effect a revocation in either of these ways, it is necessary that the burning &c. be by y^e testator, or in his presence, & by his direction. Pow. 629. 30. Secus no revocation — i.e. if it remain illegible. Pow. 652. Suppose the devise destroyed — may the contents be proved? No such case, I believe — Note the analogy to deeds, lost or destroyed by time & accident. 3 T. R. 151. 276. B.C. 263. 1 Wils. 16. Stra. 1180.

Revocations effected in these acts, are in the nature of implied revocations at C. L. — Hence y^e acts themselves, tho done by testator, are not considered per se, as revocations, but, as furnishing evidence of revoking intent. Pow. 633 & Comyns 52. 1 P. W. 346. 3 Wils 568. — Intended

or visible signs of such intent."

Of course they amount to revocations or not, as they are done or not, animo revocandi. Thus if devisor should throw ink instead of sand on his devise, or having two, shd by mistake cancel y. latter instead of y. former - these wd be no revocation. 1 Vern 434. Comyns 52. 1 P. Wms 346. 3 Wils 508. 4 Burr. 2515.

But it is not necessary that the devise be torn or destroyed - even the slightest thing y. will be a revocation, if accompanied with a declared intent to revoke: as where one slightly tore his devise & threw it on the fire, but it fell off, & was taken up - but it declared, that it should not be his will &c. 1 Vern 435. 2 Bl. C. 1043.

So, if there are duplicates of a devise, & testator tear y. one part, animo revocandi, y. other is revoked. 1 Vern 437, 434. Com 453. 1 P. Wms 345. 2 Vern 742. Comyns 49. 2 Ves. C. 460. 1.

These acts depending for their effect, on testators intention, amount, in some instances, only to "dependent relative" revocations - i.e. when done with reference to another act, intended to effect a new disposition, their revoking effect depends upon y. efficacy of y. other act. 1 Vern 437.

Thus where one, thinking, that a new devise of his estate was completed, when it was not, tore off the seals from his first one - & on being informed otherwise, destroyed, and said "it was done" &, known completed his subsequent devise the first was not revoked. 1 Vern 438. Eq. Cas. Ab. 409. 3 Chy. C. 155. 1 P. Wms 343. 2 Eq. Cas. Ab. 770. 8 Vin. 140. Com. 451. 4 Burr. 2510. Note.

y.

the analogy to the case of a disposing & revoking will - ante.)

A will obliterated in part, by testator animo revocandi, may be good as to the rest. Thus where one, having devised all his Estate to A. except 5ac. afterwards struck out the exception - y. part not obliterated, remain'd good. Pow 643. Comyns 312.

A instrument, made under the revoking clause of the Stat. not valid, the testators signature is in y. face of the instrument - unless it was intended to authenticate y. revoking part. Pow 644, & 3 Salk. 86.

The Stat. & Com. on y. subject of revocations. The rules of C.L. generally apply here - 2dly. as to revocations by parol, (ante.) -

Of Republication.

A devise, tho revoked, may, if not actually destroyed, be revived by a subsequent republication. For being ambulatory, till testators death, it may as well be confirmed or revived, as revoked. Pow 652.

And before the Stat: of frauds, as parol declarations were sufficient to revoke, (ante.) so they were sufficient to republish, a devise. Pow 652.

But Of Republications at C.L. Vide. As they stand since the Stat. of frauds & Perjuries.

And 1. At C.L. republications were much favoured. Of course any slight words will effect a republication Pow 652.3.

Thus if one having, made a devise of his land & purchase other land, & then declare his will, as it is, or verbally declare that it was his will it shd be republished & the land so purchased shd pass by it. Pow 652.4.5. Dy. 143 a.c. 1 Rol. 618.6.7. Sti. 344. 418. 2 Show 48. 1 Rol. 82.3.

Of Devises.

So if one having devised all his Lands to his Ex^{rs} & afterwards purchased other Lands, sh^d be applied to pass the Latter, & sh^d reply "they shall go with my other Lands to my Ex^{rs}," the devise w^d be republished, & w^d help the Lands thus purchased. Pow 653.4. Cro E. 493. Moore 404. 2 Chy R. 72.3. 1 Freem. 264. 2 Vern 209.

And according to one Report of the Case in T. Jon. 2 Chy R. the testators saying (on an application as supra) "My will is in a Box in my Study." was holden sufficient. Pow 655. 2 Vern 209.

So these words "My will is in the hands of J. S. Clerk of Stand^d," have been holden sufficient. Pow 655. 2 Show 48. & vid. 1 Rol. 617. Z. 1.

So any act subsequent to the revocation of a devise, & shewing an intent that it sh^d remain, w^d amount to a republication. Pow 655.6. 1 Rol. 617. Z. 1. E.g. delivering it to one in token of such intent.

So tho a subseq^t proffment to the use of Testors will, was holden to be a revocation, (ante.) yet the reference of y^e proffment to the devise was holden to be a republication, & thus to give it effect. Pow 582. 656. 1 Rol. 617. Z. 4. Cowp. 130.

But the subsequent appointment of new Ex^{rs} & giving of a Legacy was holden to be no republicat^n of a devise of Land. Pow 656. 1 Rol 618. vid. post.

And it has been holden, that the mere addition of a Codicil taking no notice of the devise, w^d be a republication at C. L. Because the very act shews that the testator contemplated the devise, as then subsisting.

Pow 554. 00 f. 673. 668. 3 Atk 180. 3 P. W. 168. 2 Vern. 209. — Con. Cro E. 493. 3. C. 1 Roc. 618. 3 S.C. Eq. C. ab. 406. 3 when the codicil related to goods only.

But the better opinion seems to be, that y. mention within a codicil, or the Execution of one, not actually annexed, tho it relate to personal property only, will amount to a republication of a devise. For it is a part of the last will, whether expressed to be so or not, & ergo furnishes conclusive Evidence of testator's considering his will as existing — & having made in addition to it, is, of course, confirmatory of it, so far as it does not revoke. Pow 668. 1 Ves. 480. as to the 2d. under y. Stat. of frauds. vid. Pow 669 f. 2 Vern 621. Ves 689, 442. 3. opinions contrary. —

At any rate, the annexing of a Codicil on the execution of one not annexed, if it expressly confirm y. devise, will be a republication. Pow. 668. 661. Com 381. — 7 Mod 68. 1 Ves. 443. 3 P. W. 329. 1 Ves. 489, 490. Com f 158. — e.g. "ratify" — "confirm" — &c

So it seems any words in y. Codicil, shewing an intent to confirm, will amount to a republication, E.g. "devise that this writing may be a part of my last will & testament." Pow 663. 4. 8. 1 Ves. 489. 442.

VII. Of Republication since the Stat. of frauds.

Neither the Eng. Stat. of frauds, nor our own, makes any express provision with respect to y. republication of devises.

But, as the effect of a republication is the same as of devising (post hac) it is holden, that no codicil or writing

can amount to a republication of a devise of Land &c. i.e. unless accompanied with the requisites of a devise unless it comply with forms prescribed in the Stat:- Pow. 80. 2. 664. 6. 686. 1 Vern 329. 2 Vez 6. 134. 1 Sid. 162. 1 Ves. 440. 9 Mod 78. Burn 192. - Parol republications thro', are at an End. Pow 664. 5. 686. 1 Vern 329. Cont. 84.

"No Codicil" (says Powel) can amount to a pub "lication, unless it comply with the Forms" &c. "to be signed "published & by testator in the presence of 3 witnesses." Pow. 664 cites Com. 381. S.C. (Comyns 160). 9 Mod 68. Holt. 748. 2 Ld. Raym. must the testator sign in the presence of the witnesses? This not necessary in original devise. (ante.) The case cited from Com. does not warrant the position: There the Codicil was thus executed, & held in good - but such Execution not adjudged necessary.

The Codicil should indeed be published in the presence of the witnesses. Pow 664. ante.)

Decided in Com. that a parol republication is not good. (Sup. Ct. Aug. Term 1800. Kelly &c.) Root 82. contra A.D. 1783.

But the operation of this Stat. does not extend to implied or constructive republications as by working Clauses do not to implied revocations (ante.) Pow 666.

So, devises of leasehold estates are not within this Stat. i.e. of terms for years. Pow 667. 586. 7. 593. Ch. C. 257. - not "Land" &c. nor "real estate" - personal property.

Under the Stat. (as to C.L. ante.) no express words of confirmation are necessary, it seems a Codicil to republish a devise. Suff. if the devise is virtually con-

firm

confirmed. e.g. "I desire that this instrument may be a further part" &c. (ante) Pow 608. 603. 4. 1 Ves 489.

So also by the better opinion every codicil to a devise, (cit. 7 T. R. 140) tho' not actually annexed, & even tho it dispose of personal prop'y only, will amount to a republication, if executed according to y. Stat. e.g. One devises his real estate & then merely executes a codicil, giving pecuniary legacies, but executed as supra. Pow 605. 9. 1 Ves 485. Causa ante p.) - 1 Bur. 554. Com 381. 9 Mod 78. 7 T. R. 484 - 3 P. W. 168. 1 Ves Jr 486. 7 Vs. 98. - Contra 3 Rep Chy 90. Sc. 2 Vern 621 Excited - 1 Ves 489. Pow 679. 681. Ambl. 571.

If one having devised all his copyholds, purchases more, & surrenders them to the uses declared in his will, this surrender is a republication; (& the latter will pass) Cowp 130. But here nothing is said of the Stat of frauds & its requisites I suppose, were not complied with. But this seems to be an implied republication; & Qu. whether such republication is affected by the Stat.

The effect of a republication is to give the devise a new date. So that the devise after publication will comprehend all such property & all such persons, as it would have comprehended, if originally made at the time of re-publication. Pow 674. 003. Cowp 130. 158. 1 Bro. Ch. 443. 4 T. R. 6-1. whereas a devise not republished will extend to no estate, which the testator had not at y. time of making it. 2 H. Bl. 523. 1 Ves Jr 204. Cowp 130. 132.

General rule that wills are to be construed according to testators intention at the time of making. 1 P. W. 400. Fortescue 182. 184 9 Mod 225. - If republished, at y. time of republication. ...

Hence if one having devised "all his lands in A." purchases other lands lying in A. & then republish, ye latter will pass. Pow 674. Cro. E. 493. Moore 424. Com 381.

So if having devised all his real estate he purchase more land, & then republishes. Pow 674. Com 381. 4 [illegible] 75. Ves. 442. Holt 745. 7 T. R. 482. 1 Vo. 204.

So if one devise to his son A. who dies, & testator afterwards has another son of the same name, & then republish it, the latter will take. Pow 675. [illegible] 1 P. W. 275. 3 Lib. 847. 5 [illegible] 60 [illegible].

So if one devises land to his daughter "not to be subject to any control of her husband" (she then having a husd) & after ye husband's death, republishes, taking notice of the husband's death, the restriction extends to any subsequent husband. 1 Br. Ch. 193.

But the effect of a republication extends no farther than to give the words of the devise the same operation as they wd have had if originally written at ye time of republication. Pow 676.

Hence if one devises land called Black-acre, & then purchases land called White-acre & republishes, White-acre will not pass. So if having devised all his land in A. he purchases other land in B. & republishes the latter will not pass. Pow 676. 680.

Hence also words intended in ye original devise as words of limitation, cannot by a republication be made to operate as words of purchase or description. Pow 676.

Thus if one devise to A. & the heirs of his body, & after A.'s death republishes A.'s issue cannot take. Pow 670. [illegible] 001. [illegible] 2 [illegible] 72. [illegible] 363 [illegible] 422. Cay. 400. 1 Mod. 207. 2 P. 313. 1 P. W. 3 [illegible]. Doug. 337. Bro [illegible]. 2 [illegible].

So, where one, having devised land to his son A. - given a legacy to his grandson A. - republished after the son's death - it was decided that the grandson A. cd not take ye land; for testator's having used the word "grandson" shewed, that he did not intend to designate his grandson by ye word "son." Pow. 678.9. 3 Atk. 318. 1 Vent. 340. Lev. 408. 2 Lev. 243. 2 Show. 63.

Note - Testator's intention is to be collected, in general, from a reference to ye state of things existing at the time of making the will - not of his death. Willes 297. Talbot 44. 1 Atk. 581.

A codicil may republish a devise as to part of ye subject-matter only. Ex. One having devised his real Estate to two, revoked it as to part of the Estate, by settling that part upon one of them, & then by codicil confirmed it, subject to the settlement. Holden that the other part should go to the two. Pow. 679. 680. 2 P. W. 324. -

But a codicil cannot give ye original devise any inherent validity which it did not before belong to it. Its effect is to set it up, in the same condition in which it was at its inception. Pow. 680. 2 [illegible] 116.

Hence if the devise itself is not executed according to the statute, a codicil which is thus executed, will not confirm it. Pow. 680. 2. 102. 116. [illegible] 270. 2 Vern. 597. Carth. 35. Holt. 742. Com. 6. 174. 3 Mod. 202. 1 Bur. 554.

L. Hardw. [illegible] said, obiter, that if a man devises thus; "all the leases which I now hold," & afterwards renews his leases, those renewed will not pass by a republication. Pow. 683. 533. 2 Atk. 590. Quære: for the words were the same [illegible] as if the devise had been made at the time of republication, (ante. Pow. 683. 6.

A devise may be republished by mere re-execution & such republication may supply an original want of capacity in devisor. e.g. An infant makes a devise, & after full age re-executes it. Pow. 686. Ibid. 162. 1 Rob. 589.

An infant may republish on the very day on which he comes of age — no fraction of a day. Pow. 686. Ibid. 162. 1 Rob. 587.

Nothing, which does not amount to a republication at Law, will amount to it in equity. Pow. 687. Ibid. 132.

Of the Jurisdiction of Courts as to Devises.

The Ecclesiastical Cts. in Eng. have no jurisdiction over devises of land only, (Pow. 518.) and a prohibition lies to prevent them from proceeding in the probate of devises. Pow. 688. 3 Rob. 30. 1 Vent. 207. Cro. El. 370. 2 Com. Dig. 315-16. 2 East 55-8.

But now if the same instrument contains devises of land & a bequest of chattels, it may be proved in these Cts. for it is necessary as to the personal estate. But the probate is, as to the real estate, of no avail — not evidence at Law. Pow. 688-9. 700. 703. 2 East 55-8. 1 Mod. 515. Ibid. 141. Cro. El. 376. Comb. 245. 2 Lev. 731. Cro. J. 343. Holt 180. Sal. 559. 3 Atk. 540. 1 Ves. 23. As to personal property it is conclusive — a prohibition was formerly granted, would it not now? 2 East 557. 2 Bac. 315.

In Con. devises as well as wills are proved in ye Cts. of Probate. But an appeal to the Superior Cts. from their decisions in all cases. If ye sentence of probate is affirmed, no further proceedings are had — if not, the cause is remitted with directions to the judge to conform to the decision of the Sup. Ct. above. Stat. C. 131. 134. post.

But there is no need of an appeal on any questn. of title to real estate. _ the sentence of the Ct. is not evidence of title in such a case. The heir or devisee may immediately sue at C. L. any sentence of Probate notwithstanding.

. The division of an estate, testate or intestate, under the order of Probate settles the proportions of those entitled to it, unless it is shewn on appeal, to be erroneous but has no effect on the Qu. of title.

A Ct. of Chy. will not set aside a devise upon a suggestion of fraud in the making of it. for if the suggestion is true, it is no devise. (Pow 176.) & whether it is a devise or not is a Qu. of fact, to be tried at Law by a Jury. on the issue devisavit vel non. (Pow 170. 091. 4. 3 Atk. 17. 1 P. W. 548. 2 Vrn. 183. 2 Atk. 324. 424. 2 P. W. 270.) 1 Eq. C. ab. 406. 2 Vh. 421. 3 Bro P. C. 358. Pre Chy. 123. con. & Sears' of a Deed. Pow 692. 2 P. W.

Similar to the Question on non est factum pleaded to a Deed.

So, whether testator was compos mentis or not, is Qu. of fact to be tried at Law. Pow 503. 5. 3 Atk. 544. 1 P. W. 2.83.

(Qu. if an issue devisavit vel non is found out of Chy on a verdict for the heir, does the Ct. of Chy. in these cases on the issue's being thus found proceed to set aside the devise, the title being tried for that purpose; or do the proceedings in Ct. cease? Pow 093. 5. 2 Atk. 324.

But there is a distinction between Chancery's setting aside a devise for fraud & its taking from the devisee the benefit of a devise procured on a confidence, which binds his conscience: the latter may be done; for here the existence of the devise is not questioned; but the Ct. decrees for the

devisee shall hold for the benefit of the party aggrieved. The ground of jurisdiction is distinct from that over the devise itself - it is over the conscience of devisee. Pow. & Mod. 156.

Ex. of A. agreed to give B £1000 in cash & in consideration of B's devising land to him. Ex. bills and suppl. it would be made a trustee for B's heir for the breach of confidence, which in equity is a fraud. Pow. & M. 7. 10. M. 285. 2 Vern. 699, 701.

On a similar principle, it is no bar, as the other rule, that if one being about to provide by devise for his younger children is dissuaded from doing it, by the heir promising to make the same provision, the heir is compellable in equity, to perform his agreement. Pow. & M. 7. 8. See Coby 4. — Fraud.

And when one devised land, to be exchanged for college lands for A. the College did not exchange, Coby decided that A. (as now) the land intended to be exchanged. Pow. & M. 2. 505 504.

In general, questions arising upon the words of a devise, are to be decided at Law - But they may be sent questions of this kind. Where are circumstances requiring equitable interposition. Pow. & M. 7. M. M. 290.

Where the issue, devisavit vel non, is directed from Ch. that Ct. will not the evidence directed by application of it, so that a fair investigation may not be impeded. E.g. The Ct. may direct that one of the parties shall produce certain deeds or writings - that he shall not set up such a deed as unconscientious to fence - or that he shall admit, in evidence, a copy, instead of the original devise. Ct. Pow. 700. 1. 7. M. 290.

Of giving a devise in Evidence at Law.

The best proof of a devise, is the production of the instrument itself, — and regularly the best evidence is required in all cases. Cow. 760. Ergo, where one claiming under a devise, relied upon a bill in Chy. exhibited by the heir (the deft.) & reciting the devise, — it was holden to be no evidence. 1 Cow. 702. 2 Keb. 35. 71. 1 Keb. 117. Comb. 395.

So, a devise exemplified under the great seal is no evidence to a jury, in Ejectment. Cow. 702. Comb. 46.

So, the probate of a will in the spiritual Ct. is no evidence, as to a title to land. Cow. 703. Comb. 240. It is so said, the proceedings are coram non judice.

Hence the probate of a will of land in that Ct. is not evidence, even if the will is lost: — for such probate is a nullity. Cow. 703. Ld. Raym. 732. 744.

But if neither of the parties has a right to the possn. of the devise, a copy is admissible. Cow. 705. 6. Ld. Raym. 735. Holt 293. 25.

But yet it is said, that the probate of a devise, ut supra accompanied with other circumstantial evidence is admissible, if the devise is proved to be lost. Cow. 706. 7.

And it seems, that if a devise remains in Chy. by order of the Ct. a copy of it is admissible — for it is a roll of the Ct. Indeed where the Ct. in which it is lodged has jurisdiction over the subject matter, a copy, i.e. an official copy, I suppose, may be read. Cow. 707. 1 Keb. 117. Gilb. L. E. 74.

Is not this the constant practice in Conn.?

But if proof of the attestation is required that must be proved by a subscribing witness if either of them is living

Cow. 708. This is a fact not proveable in its own nature, by copy.

If there has been a probate of the will in Eccy; is not that conclusive evidence as to ye fact? post.

At Law, however one of the witnesses is suffi. to prove what all have attested. But he must be able to testify, not only that testator executed, & that he signed in testator's presence, but also that the others did the same. Secus, he does not fully prove the execution — on his thus testifying, the devise may be read. Cow. 700, 70, 708. 1 P. W. 741. 2 Atk. 1254.

And tho the witnesses are all present, it is not necessary that they all testify to the fact of testator's executing & publishing. If it were, an obstinate witness might defeat the devise. Cow. 704. Stra 413. Holt 742.

But if one of the witnesses refuses to swear, it is necessary to prove ye fact of his attestation. Cow. 709. Stra 413.

And the subscribing witnesses are allowed to deny the facts which from the face of the instrument they are presumed to have attested. Cow. 709, 712. Stra. 79. 1 B. C. C. 95. 4 Burr 2224. E. g. their own attestation — testator's sanity — or his signing. Valeat [illegible] contra.

But the testimony of the subscribing witnesses is not conclusive vs. the devisee. If they should deny even their own subscription, ye devisee might contradict it by other witnesses. Same rule as to testator's sanity &c. Cow. 711. Stra 1096. 1 B. C. C. 365. Bull. 264.

On the other hand their evidence if in favor of the devise is not conclusive against the heir. He may contradict them. Cow. 712, 713. Stra. 73. 4 [illegible] 200.

But a Ct. of Chy will not direct an issue to try

the sanity of testator, where the subscribing witnesses swear that he was sane, unless the suggestion to the contrary is supported by some direct evidence. Pow. 712. 3 Atk. 359.

Of Proving a Devise in Chancery.

It is usual in Eng: when a title to real estate depends upon a will, to prove it in Chy. especially, if the will is of modern date. Pow. 714.

The probate of a devise in Chy. is in effect conclusive upon all persons, & prevents its being disputed afterw. even in a Ct. of Law. For if ye heir, or any other sd. after the decree, attempt to controvert it, Chy w.d issue an injunction agt. him. Pow. 718. 1 Wils 216.

In Con. Chy has no concern with the probate of devises or wills. ante.

But Chy will not declare a devise proved, unless the heir is "forth-coming", i.e. to be found. Pow. 714. 2 Atk. 120.

It has been holden that such a probate of a devise is not necessary, however, in order to establish a particular claim, under it, even in Eqy. Pow. 715. 3 P. W. 192. &c.

And tho the heir voluntarily makes default, yet the devise will not be declared to be well proved, if ... Proof must be made, as if it were contested. Pow. 715. 3 Atk.

The probate of a devise in Chy, being thus conclusive, it is an established, invariable practice in Chy not to decree a devise proved, unless all the subscribing witnesses are examined — for the heir has a right to claim that all of them testify, before he is disinherited. Pow. 718. 1 Wil. 216. 1 Ves ...

The practice of our Cts. of Probate is to declare a devise

proved, on the oath of one of the witnesses. But the probate here is no evidence of title. ante.

And the rule is the same in Eng.d tho one of y.e witness is beyond sea. His hand-writing cannot be proved, for it is not presumed to be out of the power of the party claiming to obtain his Evidence. Pow. 719. 1 P.W. 2 Vern. 454. 1 Atk. 627. Show. 174.

When a Commission issues from Chy. to take depositions to prove a devise, y.e devise itself is sometimes delivered out of the proper office, on security given & in some instances Chy. has ordered the prerogative Ct. to deliver it out on security. Pow. 721.3. Fin. 401. 1 Atk. 627. 2 Atk. 627. vid. 2 Fel. 611.)

A Bill to perpetuate y.e testimony of witnesses to the devise of a lunatic, will not lie in his life-time. The lunatic may recover & revoke. Pow. 723.4. Vern. 105. 1 Eq. C. ab. 234.3. ante.

Devises.

By the Judge: July 15. 1813.

This subject depends upon the adjudication of cases, or the construction of wills.

This species of alienation was known to our Saxon ancestors, previous to the norman Conquest - tho it is not probable they took the custom from the German woods.

The feudal principles which prevailed thro the realm, prevented this, as well as all other species of alienation, for a great length of time.

Personal property was always first devisable - & devisable in the first place by parol. - It became common however to commit the will to writing.

The restraint on alienation by will lasted longer than the restraint on other species of alienation, as by deed. By the Stat. 32. Hen 8. alienation by will was allowed as to real property - & made it necessary that the will be in writing. - This Stat (This Stat was explained by St. 34. Hen 8.) enacts that femes covert, infants, idiots & persons of non sane memory should not have the right of (tho by Stat. 32 Hen 8 all persons had this privilege) alienating their property by will. - I think on the gen[l] principle that idiots & persons of non sane memory are to be excluded as to infants they cannot alienate their property under the age of 21. & it was thought necessary to prohibit them from devising their real property. Femes covert are also excluded from devising by the same Statute.

Devises.

This Stat. was the Law of Engd. at the time of the emigration of our Ancestors & the Stat. of Car. was made after the commencement of the settlement in some of the Colonies. This Stat. has been expressly adopted & its construction with it, as the Law of almost every State in U. S. tho' not originally binding upon us.

The term "Devise" in strictness means, the disposition of real property — a will is strictly a Devise of real propy. & the disposition of persl. propy. by will is strictly called a testament. But these terms are used synonimously.

The Stat. allowing Devises gives the privilege to all kinds of property except such as is holden in joint tenancy, which cannot be devised in Engd. & this is the ground why this species of property cant in general be devised in U. S. Some States however have expressly made ~~the~~ ~~all~~ joint tenancies devisable like other property. {others have used the term "all estates" under which they are included.

Some Coverts are excluded in the Engd. Stat. from devising. Some of the States have adopted the Stat. with the exception of this provision ~~Extended the~~ ~~the privilege of devising~~. Then the qu. arises as to devise real propy. Now this depends altogether on the capacity at C. L. to devise persl. propy. My own opinion is that at C. L. sh. might devise persl. propy. if sh. had any title ...

There is a great difference in the construction of words used in wills & the same words used in Deeds. If an estate in Lands is given to "J. S. forever" at C. L. gives him an estate for life, & so any other words would fail to give him a fee unless the word heirs were used. Every thing knuckles to the superior power of technics. But in wills such words will

pass a fee if the intention to pass a fee can be collected from the instrument. The reason of the difference is that the rules of construction as to wills were established at a much later period than those by which Deeds were construed. The rule as to wills is, the intention of the testator is to govern. This rule holds when the man attempts to create an Estate known to the Law; If he attempts to create an Estate of which the Law is ignorant, his intention will not be followed as if e.g. the testator attempts to create an Estate tail in pur. prop. the donee will take an absolute Estate in fee. Or if he attempts to create a fee simple which will descend only to male heirs. this is a vain attempt, & will be disregarded, for the Law knows of nothing of an Estate in fee descendible only to p. male heirs.

If the testator's intention is not consistent with the rules of Law you see his intention will not prevail. But by this you are to understand his intention as to the thing done, & not as to the words used. He is not permitted to do what is unknown at Law. The Statute of Uses conferred no new power on testator to create a new Estate - but now by Law in the power to create an Estate known at C. L.

At C. L. an Estate, ~~in futuro~~, cd not be created, to commence in future. it must commence eo instanti. But by devise you may - an Estate may be made to commence 10 years hence. To be sure an Estate at C. L. may be created to commence in futuro, if there is an intervening Estate to support it. But a devise needs no such intervening Estate.

Whether the words create an Estate in fee or

for life, is a Rule which depends entirely upon the intention. Thus if A.S. owns a farm in Bl. acre & gives "all his estate" to A. A takes an Estate in fee, for the testator owned a fee. So if he uses the words "all my prop^y," the word "estate" will take the real & personal prop^y of which the testator died poss^d. This rule is generally adopted in U.S.

The operation of a will upon Real prop^y is very diff^t from the operation in case of pers^l. Suppose the testator devises to A.S. "all I am worth", what is he worth? Bl. acre. But afterwards he acquires 10 acres. will 10 acres pass? no. as to this he died intestate. But in such case with respect to personal prop^y the whole will pass, which he owned at the time of his death. for pers^l prop^y is of so fluctuating a nature, that it may be impossible to ascertain what pers^l prop^y he had at the time of the will made. But in case of Real prop^y given by will & another Estate is acquired afterwards, & he then republishes his will, the latter Estate will pass by virtue of the republication. But if the words of the will are "all my Estate in A", & the after acquired Estate is situated in B. & he will republishes it, the latter estate will not pass under the force of the republication.

The instrument called a will, is ambulatory till testators death. i.e. liable to revocation either express or implied. This is an important rule to solve Quest^s which have arisen in Eng^d & U.S. & which will be considered hereafter. Perhaps it is meant

Devises.

Before the Stat of Car. wills were revocable by parol - but now by Stat. it is necessary, that the revocation to be express should be by writing - This Stat. is generally adopted in U. S. tho in some, the C. L. doctrine prevails - 1 Mod 177. as to revocations &c

No particular forms of expression is necessary to be used in a will - tho certain particular words are made necessary they must be followed. A Question has arisen whether an Estate or contingency can be devised by will, while the contingency remains unexpired. Formerly it was holden such estate cd not be alienated in any way - But it is now settled that they may be devised as well as any other Estate. No property in Eng. cd be devised except such, as the person was actually seised of - this was y. objection to the decision of the above Question - the answer is that the devisor was as well seized as the nature of the case cd admit - The law depends upon the Stat. in U. S. What properties may be devised see, 1 Bac. Ab. 251. 1 Mod 177. 2 Bur 1131. see 1 Vo. Ca. 30. Pow D. 35. -

2dly Have pointed out what property is devisable - What property then is devisable under the Stat? Now it is apparent that in Eng. none but a fee simple is devisable. But it is not necessary that it be actually seised - a right of decision is sufficient. (it is stuff if another is seised for him, nor) There is no exception to this rule except the disseisin was the consequence of fraud. The fraud blots out the existence the thing done under it - As in Sales in

joint tenancy is not devisable. How is it where the words "all profits" are used, as they are in some of the States? Doubtful they may be devised. In Com. an Estate for the life of another is devisable. But in Eng. it was not so till a Stat. (29 Car. 2.) was made expressly for this purpose. On principles of C. L. it cd not be devised. An Estate tail in Eng. is not devisable, unless first converted into a fee simple by fine and com. recov. Popl 94. Cro E. 58. Co L. 41.

I found a Case in the Year Books where the Qu. was whether such Estate cd be devised. It was where it was p. Custom was to devise all Estates. & the Ct held they were devisable & included in the Customs.

A number of cases were decided under y. Stat of 1 Hen 8. & before that of Car. II. Some of which are & some are not now Law. It was settled under the Stat. of Hen. that the whole will must be made at the same time. But this is not now Law. See Pow. D. 12. & 33. 1 Bur. 548.

Suppose a man has 3 or 4 wills on distinct pieces of paper, devising diff. kinds of profits & all consistent with each other. It was formerly considered that the last one made was the only one. But it is now settled that these wills, if consistent, may all be cond. as his will. 1 Show. 2 45. 553.

There is a case in the Books where the last will seemed inconsistent with the first & the Ct held that both wills were good. Cro E. 721. Bac 187. They followed the evident intention of the Testator & this decision seems.

Another point settled during that period, & which is now law, was, that a reference in the will to another instrument was good - as where he devises &c according" as a person whose name was written on a certain piece of paper & "reference to that paper was allowed. ~~to be good to~~ Cro J. 144. 10 Mod 530. It was taken as a part of the will - the same as if the paper referred to, had been detailed in the will. —

Lecture 2nd

If a will is made inconsistent with a former one, the former is revoked - but a codicil is not a revocation. It may be added to it, or explanatory of it &c. The codicil may not be annexed but refer to it - then it is a codicil only.

Another point settled during that period - that where a man mentioned in a letter to a friend that he wd dispose of his property, it was spoken as a will. This is of no use to us - It was a loose method of devising & was doubtless one among other causes which occasioned the Statute.

Again - when the Devisor was in such a situation as to be unable absolutely to write or direct his will, that if at a time when he was able to direct, he did direct it & put it into writing, tho when drawn he was not able to sign it &c it was ~~decided to be~~ a good will, on the presumption that y. atty followed his instructions. But this loophole is done away by Statute law, which have prescribed certain requisites which must be followed, else the man will die intestate, let his intention be ever so evident. —

The

Devises.

The 1st requisite of this Stat. is that all devises of lands which are devisable by Stat Hen 8. or also all devisable by Custom, shd be in writing. The Cattle clause is generally left out in our Md Virg & N.C.

The 2d requisite is that the devise be signed by devisor, or some one in his presence & by his direction.

The 3d is that it be attested by a certain no. of witnesses in his presence.

The next is that this be done by three or more credible witnesses, these are all requisites.

There is no form or technical word which must be used - the intention of the testator must appear - & that will be followed if consistent with the rules of Law.

The Lex loci where the lands lie must prevail - If the lands are situate out of the Govt of the Land of the place where (C. B. 291.) they are, must be followed in the devise of those Lands.

It is not an uncommon thing for a man on his wife to give another power to transfer his property - Now the taker a transferee may transfer it by deed or by will - but if he transfers it by will, it must have all the requisites of a will. This power of devise is a power in the owner of land that he may not only devise his Estate, but also a power another to do it same. 1 P. W. 740. 2 Atk 288. 285. 2 Ves 179.

Of the requisites. The first was so

illustration. It is necessary the devise be written that is all.

As to the second. A Qu. arose as to what was a signing. Had the ordinary ideas of mankind been followed as to what is generally understood by a signing, viz, writing his name at y^e bottom, much difficulty w^d have been saved. I do not think you can infer from the testator when he signs "J. J. S." at y^e top that he actually meant to devise. But it is settled by the Law that it matters not where the name is situated whether at the top middle or bottom, provided his intention was apparent.

Another Qu. arose in a case where the will was not written by the testator, nor signed by him, but sealed by him which could be proved. The Qu. was whether sealing was signing. It is settled that it is not signing. but that the name itself must appear.

Another Qu. The man wrote the will in his own hand, & directed that it might be read to him to sign, but was incapable to do it. The Ct decided the will was not signed. The rule laid down by the Ct was that if you have evidence the testator meant to sign, but did not, it is not a good will. wanting this requisite. but that where he had signed at y^e top, it manifests no wish to sign any further, it is a good will. 1 Mod 219. 2 Vern 464. 1 Wils 313. 1 Doug 229. (1^st 28^th) Wright vs Price.

There is no necessity to seal a will according to the Statute but still it is an universal custom to seal it. Universal practice may make it necessary.

As to the third requisite. The first Qu. is to what does the person attest? One thing is clear that he attests to the corporal act of signing - that y. testator did sign - But this does not preclude the other party from contesting this Evidence & enquiring into the fact. But it is also said that the witness attests to the fact of sanity in the testator. This I think is incorrect - for were it so the same witness who attests the will cannot be suffered to come into C. & swear to y. insanity of the testator - & this is the constant practice - The attestation supports the presumption that he was sane, & throws the proof on the opposite party that he was not so - he is sane till proved insane. 1 Ch. Rep. Parsons v. Coot. 2 P. W. 506.

What then must the witness be able to swear to? One witness saw the testator sign it - & then the testator calls in another - will it not be suffic. if the testator informs the witness that the signing is his? It is. & when this done tho the witness did not see him sign, yet can attest to the corporal act of signing. It is an established rule that an acknowledgt. of this kind is sufficient to enable a witness to swear to the fact. But any thing short of this will not validate y.

(2 Vern 455. 3 P. W. 253. 2 Ath 182.) the will - as when the testator S. this is my will". not sufft. no acknowl. of signing.

It must be "subscribed in the presence of the testator." It is held that if the witnesses subscribe in the possible view of the Testator it is sufft. But if he cd not see them it will not validate the will. It may be in an adjoining room if the testator cd see them there, tho in fact he did not - But if they went down stairs out of his possible view, it is not a good signing. Garth 81. 1 Salk 395 1 Brown Ch 99.

Suppose he could have seen, if he would, tho he did not, there is a case where the Ct. recognized that such a signing was good. It was claimed the signing was not good on account of fraud - tho made in the testator's presence but it turned out, there was no fraud. 1 P. W. 740.

In the case in Doug. Wright v. Price arose another Qu. The witnesses subscribed in the corporal presence of the testator, tho he had become deranged before their subscription. It was held that such was not good signing. That he must have a mind capable of rejecting all the last moment.

If two of the witnesses are dead or out of the jurisdiction of the Ct. the will may be proved by one witness, who can swear to all the facts, the signing of the testator as well as that of the other witnesses. If the other two are by, but they must be produced, as being the best evidence. But suf-

pose they are all dead &c. you then may introduce testimony that the signing is the handwriting of the testator & the witnesses. But does this prove that the witnesses signed in the "presence" &c? No. unless then you must presume the fact of its having been done in the presence - for it is the best & the only evidence which can be had. 2 Show 1109. 1098. 1 BC. R. 305.

Suppose one witness comes into Ct. & swears to all the requisites necessary - & another witness swears to the contrary - But can he swear to the contrary? Certainly - i.e. if the witness name was forged &c. But if he acknowledges he signed he will not be permitted to swear that testator did not sign. For this is inconsistent with the attestation. If jury believe that the witness who swore that his name was forged swore falsely, & they believe of other they may consider the will good & establish it. - So they may establish the will when there are 2 or more who swear to it done fair, if the latter one is believed, & the others not.

Sect. 3d.

As to the No. of Witnesses - three or more are required by the Stat. This has been a subject of contention - a man made a will & had but two witnesses only - he then annexed a codicil with two witnesses - was it sufficiently witnessed? Such a will has been holden good thus. The ground on which the decision was, when it was urged that the witnesses to the will knew nothing of the

& so wise versa. The next case was where there were no witnesses to y. will but three witnesses to y. Codicil which Codicil recognized the will, the y. will was not present at y. execution of the Codicil. it was holden not good. & I have no doubt but had the will been present the decision w.d have been otherwise. The next case was where there were no witnesses to the will but a sufficient number to y. Codicil, which codicil was annexed to y. will. this was holden good on acct of the presence of the will at the time of witnessing y. Codicil. Now I have no doubt but this with's, are all consistent, & the governing principle is that the will must be present. An other case was where the will was written on several pieces of paper & the testator signed every sheet, & the witnesses saw him sign the last sheet only, & attested it. Now if these were distinct & several wills, it w.d make a difference. but it was not so. they were all parts of the same will, & present at y. attestation of one, to y. rest.

A fifth case where the will was made by a man ignorant of the no. of witnesses required, & his will was not witnessed at all, he afterwards executed another writing sufficiently witnessed which writing (a) was expressly in the will, & the writing referred to the will. it was present at y. attestation of the writing it was considered good & as part of the will. the amount then is, that there must be three witnesses to y. will, tho sufficient if the attestation is on another piece of paper, if the will is present & as supra.

Carth 35. 1 Show 68. Pre. Ch. 184. 2 Vern. 174.

"Three or more Credible witnesses." There has a Qu. arisen out of this branch which has agitated the Ch. of Westm. Hall more than any other Qu concerning wills. The great Qu. is whether any persons cd. be witnesses to wills who had legacies in the will. whether their attestation was any thing? another Qu. was, whether they can by any matter ex post facto become pungis? or by releasing their legacies become good witnesses. Now some contend that the witnesses were incapable of attesting, & therefore the will is void ab initio. If they were not witnesses at ye time no subsequent fact can make them, say they. e.g. a man is infamous at ye time of attestation. now can this man after a removal of his disability be a good witness to prove ye will. - they say no. On ye other hand it is contended that these men were not interested but if they were then any release that interest. L. Mansfield & L. Camden were the great combatants. Mansfd does not enter into ye idea of interest, & says they may be purged but Camden says he was incapable of attesting on account of interest & cannot be purged so as to prove ye will. L. Camdens opinion I think is correct if his premises are not false. I conceive he has no interest it is contingent, whether he ever receives it or not under ye will or not. But the rule of evidence is that a witness to be admitted must have no

real & not a contingent interest. If the contingt. int. w? Exclude, a Son could not be a witness for in a case concerning real prop. of which he was a presumptive heir— f. father, or vice versa. He certainly on principle is a competent witness, tho the objection (i.e. in f. case of a son testifying for the father &c.) may go to his Credibility. The witness to a will thinks attest to f. confession and of signing. His contingent interest under f. will will not exclude him from doing this — An infamous person cannot attest to this or any other fact. — The witness's interest is not pecuniary — it is contingent. the will may be revoked the next day & he receive nothing — If then there is nothing more in the Stat. which alters f. rules of Evidence, they are certainly competent witnesses, on a release of their interest.

But it is contended, there is something in the Stat. by which the Legislature meant to point out certain Characters who sh? not testify. Now, if by the word Credible they intended to preclude legatees from testifying, it is certainly a very awkward & obscure manner of Expressing their intention — It appears to me that it is only a word thrown in without reflection, which was not intended to introduce any new principle of Evidence. Else they w? have been more careful to express themselves. Suppose they had used the word Competent. I conceive it to be the same thing. If then they meant to exclude legatees, devisees &c they meant to consider them not credible, when the Law is well

settled that the objection to such persons is to their credibility, not to their competency. These very persons, had one of them had been the heir at Law or devisee, he wd have been a good witness.

The next Qu. is whether if there were not instrumental witnesses they can be brought so as to prove y. will. I have no doubt. but if the thing is void ab initio it can never afterwards regain strength. On the death of the testator, (y. will unaltered) they are interested. but cant they release that interest? It has always been y. case where the interest arises subsequently, on releasing that interest he will become a good witness. This then I believe to be y. case. tho this Qu. depends upon the former. If I am wrong there I am here.

Suppose then one witness is interested cannot the other witnesses prove y. will. I think so certainly. for had he been dead at y. time of the trial, or become infamous after attestation, his hand writing could be proved & so in this case. he is disqualified from testifying in Ct. but his evidence may be supplied by other witnesses, as if he were dead or infamous, or out of the jurisdiction of y. Ct. Stra. 1253. This decision went on y. ground that they were not good (? Bl. 377) instrumental witnesses. This decision was alarming & produced y. Stat. 25 Geo. 2 declaring all legacies to witnesses, void. This Stat. has been adopted in some of the States. But from this I suppose no inference

can be drawn militating ag the doctrine I have laid down. 1 Bur 414. Kinsey ~~ag~~ Doe in Day L^d. Cambdens opin^n the case in point of auth. (whether a person can prove y^e will on a ~~u~~ clear ~~d~~) stands thus. Ch. J. Lee & 3 puny judges with him, L^d. Cambden & one of the puny judges, in another case of opinion were; that they were not good instrumental witnesses there are six — On y^e other hand is L^d. Mansfield 2 puny judges with him, & the 3 puny judges in y^e case which L^d. Canbden decided — equal six. — So it is seems not really settled. This Que. has twice arisen in Con. The first decis^n was, they were ~~not~~ witnesses, the next was that they were witnesses by the casting vote of the Ch. judge — It went up to y^e C. of Errors & they re versed the latter decision of the Sup. Ct. & adopted the idea of L^d. Cambden. — It is Questio vexata still. There was anoth^r. case in Con. which I mention be cause it may seem the Ct. of E. contradicted themselves but not so. (It arose out of our local Law — it was a large Legacy given to the Academy in Colchester the inhabitants of y^e town were witnesses to the will they were held good witnesses — because we have a Law allowing such attestation.

The will must be "published," it is said, now the Stat. of Con. requires no such thing, & I think were that Que. to be raised it w^d be found not necessary, If y^e will has all y^e requisites of the Stat. it is a good will. Under y^e Stat. of Hen. which required only writing, it was necessary that there sh^d be a publication — but this is not required by y^e Stat. of Con. for other requisites are pointed out. Therefore

think publication not necessary - but if it is necessary doing what is required by y. Stat. is a publication. 3 Atk 156.

I have observed that it was necessary the witnesses will be present at y. time of attestation. This a Rule which often arises - & is to be determined by y. Jury. It is a Question of fact for them to decide - not a Qu. of Law. 3 Ellis 263. 1 Atk 407. 420. 454. 3 Burr. 1773.

The proof of the devisors signing, if the witnesses are alive &c - by them, if dead by their hand writing &c & them presuming they did it in the presence of the testator, & have before mentioned. -

Sect. 4th.

Of the Revocation of Wills.

There is a Qu. on which Sam. unable to find any decisions - but only the proposition of the statute writers It is this - that a will may be given as to personals & not as to Real property - In a devise of personal property there is no need of any witnesses - but in a devise of Real then is - Now the case is this - The testator supposed he had made a good will - he had provided for his family by devising to some the property and to others y. Real - Now if the wife is not paid as he means, the intention of the testator is defeated whether y. testator devises his real estate to his younger son or the personal property to the eldest - Now if it fails as to y. real estate, & the gift as to y. younger the eldest son will take all y. estate, the pers. by devise, the real, by descent. I think it is a Rule open for discussion - it appears to me it is

an implied revocation. I now proceed to treat y subject.

<u>Revocations</u> are <u>express</u> & <u>implied</u>.

In U. S. implied revocations are the same as they were in Eng. The Law as to these, is not altered by y Stat. But the revoking clauses of the Stat. (Stat. Car.) vary diff from the C. L. revocation. Of course where there is no such Stat. in the States, the C. L. revocation prevails. Of course it is important to ascertain both these species of revocation.

This Stat. requires certain solemnities to be used in the (express) revocation: but at C. L. none are required. At C. L. nothing but evidence of an intention to revoke is necessary. I am now speaking of <u>express</u> revocations. Before the Stat. an (express) revocation might be as well by parol as by writing. & some of the States follow the Stat. requisites & some not. Where it may be made by parol, it may be proved by parol.

The revocation however, before the Stat. tho allowed to be by parol, must be made in such a manner, as that it appears <u>clear</u> such was his intention. So under the Stat. there must be an <u>animus</u> revocandi. As when the testator (by mistake) cancelled his new will, when intending to cancel another one, the animus (to) r. y same will, was wanting. The fact of its being done, is not per se a revocation. 1 Roll ab. 615. 2 Do. p. 115, 417. (Bir. 73.)

Any thing indicative of an intention to revoke will be suff. But words used in irritation & spirit may not suffice. The intention must be <u>clear</u>. I shall postpone f. further consideration of express revocations till I come to treat of the Stat.

Of Implied revocations.

This revocation may arise from a collateral act of the testator, some other act than that which absolutely revokes, but which implies an intention to revoke.

It may be revoked too by some act of his furnishing grounds to presume an intention to revoke. The 3d. is, a revocation implied by act of Law. 3 Wils. 512. 1 Show. 587. 3 Mod. 203. 3 Wils. 497. Cowp. 87. 7 Bro. Parl. C. 344.

This implied revocation from a collateral act of ye. testator, is to be found in a 2d. will which is inconsistent with a former one. The rule is, that if ye. 2d. is inconsistent in a material part, ye. former is revoked in toto. But I think on principle it sd. revoke it pro tanto & not entirely but such is established ut supra. & "stare decisis" is an important maxim.

A codicil will not revoke the will any further than there are words expressive of an intention (1 Ves. 178. 186) to revoke. Not so as to [illegible]. —

There is a case in Cowp. supra which makes a great figure. The jury found there was a second will made, inconsistent with ye. former, but which was out of ye. way. in what ye. difference consisted they did not know. The Ct. of C. B. said the 2d. will was revoked by ye. finding of ye. jury. The Ct. of K. B. reversed the decision, & the House of Lords confirmed the latter decision on the principle that such was no finding at all, by ye. jury.

There is one case where a 2d. will may be made inconsistent &c. & yet ye. former is not revoked.

This is where the 2d will is made under a false impression of a fact — as where the Devisee in a will dated [illegible] for years at Sea & supposed to be lost, & the Testator mentions this fact in a 2d will as the ground of his making it — of the Son returned — was this a revocation? It is laid down by y. Elementary writers as

& was decided in Allyns Ld. — not to be a revocation. There is another case where the 2d was made under a false impression of y. Law. is this under y. former one? The testatrix intention is as much thwarted in this case as y. last: on a principle of policy it was decided to be a revocation. It was a case arising under y. Statute of mortmain — a man made his will & devising property to a Corporation, it was held that on account of the Statute it did not take effect, & the attempt void — but it turned out that the donation was to a society which was an exception in y. Statute. We have nothing to do with the Statute of mortmain in this Country. The decision was in pursuance of the great maxim, "ignorantia legis non excusat." — If such were not y. case, you wd be obliged to go into an examination of the testators legal science, which wd introduce much confusion. Vide D. "Revocation."

Suppose a will is impliedly revoked by a subsequent inconsistent one, & afterwards by positively revoking the second, is the former restored? On y. ground of intention. The decisions are, that the first will is revived. I think this is doubtful — & that his intention is to give

it to his heir at Law. 4 Burr 2512.

Suppose y.e 1st will, be allready destroyed. He first gives y. property to Mokes. then gives it to White & destroys that giving it to Mokes. & then revokes y Codicil. the first cant be set up. & no parol Evidence of its contents can I think be introduced.

Suppose the 2d will expressly revokes the first. it is decided that in such case a revocation of the 2d does not set up the former. But I do not see the least ground of y. determination. Coup 49. 53.

But in this case it appears the first will & the 2d were cancelled, but there was a duplicate of the first Will, not cancelled. How will not this furnish a reason for the decision. for it is a rule of Law that when an instrument is cancelled, duplicates of it, are so of course. The wills were both revoked & both cancelled. From this I think the case does not warrant the principle above.

The alteration of circumstances. The circumstances of the testator may be so altered that it furnish is a presumption of an alteration in his intention. what are these alterations? This is a Question for discussion. The first that I have seen is where a Bachellor devised his property at a time when he had no intention of marriage, but afterwards married & has a child. Such the Law presumes the intention has altered. But will it also presume the same if he marries & has no child? There is no case

pro nor con. But under certain circumstances, I think the principle to be extracted thus;

But it is not the birth of a child merely which furnishes y. presumption - this must be connected with the other circumstances of the case which tend to furnish y. presumption. If T. S. is worth $100,000 & gives away $5000 of it, & has a child: is this a revocation? No: It must be such a thing as a reasonable man wd never do. a reasonable man wd not disinherit his wife & children, & go, if he gives it all, the principle operates - this furnishes y. presumption - Some say nothing short of y. birth of a child, & a total disinheritance will suffice - but this unqualified manner of stating y. proposition, I do not believe to be correct. Doug. Bradley v. Cubit. cities Sprag v. Stone. 4 Burr 2171. K. 2182. 2 Ray. 441. 1 Pow. D. 204. all y. cases 5 T. R. 49.

The proposition I have drawn by y. Ct. in all cases is this: there is a presumed intention to alter - there can be up this case - a man had devised & married, & died without having a child or supposing he shd ever have one. But a child was born after! The argument above fails here - but Ld. Kenyon has found out a way to provide for y. child by saying the testator made a will on an implied condition that it shd be void, if such contingency happened.

Suppose a man makes a will - is afterwd insane - & the property changes before his death, so that if the will is established, it will thwart his intention, i.e. if he were in sound mind. Now the authorities are all that this alteration in his

situation is a revocation of the will. This often operates very hardly upon individuals, but the doctrine is well settled, tho not correctly in my opinion. It w^d seem it ought to be revocation — for if a feme sole devises & afterwards marries, it is construed to be a revocation. Vern 105, 4 Co. 61. Nor is the will revived tho she survive her husband, & makes no other disposition of her estate, it was revoked by y^e coverture.

Sect. 5th

Another species of implied revocations arises from an intention to revoke — e.g. If the instrument intending to revoke, is deficient in requisites so that it cannot operate as a will, at C. L. it is an implied revocation of the first — the will being bad as a devise, will it answer to revoke? The rule of C. L. is that it is a revocation & that y^e property will descend to y^e heir at Law, on y^e ground that it appears to be y^e intention of the testator to take y^e prop^y from the first devisee. But it appears to me that is a doubtful Qu. whether the testator intended to give y^e property to his heir. But the rule must be settled somewhere. [illegible] 529. Cop. 108. 1 [illegible] 349. 1 Roll ab. 615. 1 Vern 176. [illegible] 32. Gilbert 140. 10 M. 237. 3. 4th 72.

This rule likewise applies to all cases where y^e 2^d devise is to a person who can't take by devise, as if the testator gives to a Corporation who cannot by Law take, the heir at Law will take [illegible]. So far of implied revocations by intention of testator. But

Devises.

There is such a thing as a revocation which arises from an alienation of the testators Estate. Here y. intention is wholly disregarded. E.g. I. S. wills the Estate to T. N. - then sells it & afterwards re-purchases it now is the will revoked? It is, with. reference to y. intention. This is an exception to y. gen. principle, which is that the intention is to govern, & in some respects must the Law.
1 Roll 616. 8 Co. R. of O.

Again - A devises Blk. acre to B. in fee simple - he afterwards marries & wishes to make provision for his wife. He then conveys the estate to trustees for his own use, & on his death remainder over to the wife for life - Now under the Stat. of Uses such alienation wd not be deemed a revocation of y. devise. But here there being an alteration in the nature of the estate, it was holden a revocation, 1 Roll 616. (Show. 92) tho it is evident he did not intend to defeat the devise.

Again - A. being seised of an estate in Tail, devises it, (which he cannot do but to give validity to y. devise) the devisor suffers a recovery which turns it into a fee - This being an alteration of y. estate, it was holden to be a revocation. 3 Lev. 108. 3 P. W. Mortimore v. Turner - Here the intention was [expressly declared to be] y. other way.

Further. A man seised of an estate in fee simple, devises it - and the estate being entangled, & he doubtful about his estate, & the opinions of some Lawyers being that y. estate was an entail - he suffered a common recovery. But it turned out to have been a fee simple before & the Ct. held the devise revoked on y. ground of alteration. This is absurd. 3 Atk. 803.

In Chy. they never consider such alteration to be a revocation of the Estate, if thereby y^e intention is thwarted. But in legal Estates, and (y^e Devises arising in a Ct. of Law) they adhere strictly to y^e principle. If the Estate devised is afterwards mortgaged the devisee may redeem y^e Estate. - He (thus it seems once) is allowed to redeem at Law the heir or y^e person

1 Vern 329. 1 Salk 158. 3 Atk 740 805. 2 Ld. Ray. 968.

But there is a distinction between a mortgage, for years, as consid^d in Law & Chy. - In the latter Court it is a revocation pro tanto, & the devisee stands on the same ground on which the owner stood - he may redeem at any time in Chy. but at Law it is a revocation in toto. & the Estate is absolute in the mortgagee. Pre Chy. 514. But this is not confined to mortgages - for in all Estates over which Chy have cognizance, an alteration is only a revocation pro tanto.

The act of a Stranger may cause a revocation. E.g. In Eng. the Crown of the States, the testator must die seised, or the devise is inoperative. Now if a Stranger disseises him, the will is revoked. 1 Roll. 616. -

But if there is fraud in the disseisin, it will cause a have effect. as in case 1 Roll 378. where the Lord disseised the Tenant, that the Land might descend to him (having devised to another.) a Ct. of Law will view such disseisin as no disseisin at all. a Ct. of Chy will lay him under a penalty to convey to y^e devisee, as if the Land had actually descended to him. y^e Disseisee

Wills.

A Qu. has arisen whether if a will is torn to pieces by it is a revocation? It is certain it can't operate as a will, if not legible. I know of no reason why proof of its contents may not be admitted. But it being a very complex instrument it will be often impossible to find out its contents. If it is torn to pieces, with intent to destroy it, it will be a revocation. But if torn by accident & can be mended (2 Vern. 441) it will be effectual.

There is a rule to be drawn, conformable to the doctrine under 32. Hen. 8. It is this. That if the alteration operates merely as an abridgement of the Estate, it is only a revocation pro tanto. This is a very reasonable rule. E.g. an Estate is devised in fee, & afterwards an Estate for life to some person. Now under this rule it will be a revocation only pro tanto. being only an abridgemt. of the Estate. This is not inconsistent with but one of the former E.g's. viz. where the testator conveys away the estate for his own use & others for the life of his wife. & 2d. suppose that of the case would come under this (Cro. C. 23.) principle.

Of the Express revocation of Wills.

This Stat. says nothing of implied revocations but remains as at C.L.

Parol proof may always be admitted of which implied revocations may arise. But in express revocations it is not so. There are three ways of Expressrevocations under the words of the Stat.

1. No devise shall be revoked unless by some other will or codicil in writing, declaring the same. or.....,

2.° It must be revoked by some other writing signed by himself in the presence of 3 or more witnesses, Before I enter on y. 3.° I will consider these two cases_

1.st Then_ it may be revoked by a 2.d will. At C.L. a 2.d will impliedly revokes y. former if they inconsistent. Now does the Stat. mean to alter the C.L. in this respect? No. It intends only that there shall be no express revocations by parol. or by any other species of writing than a will containing a clause of revocation. Now what must this will be? It is necessary the revoking will be a good disposing one. executed conformably to y. Stat. of frauds &c. any other will will not revoke...

But 2.dly a former one may be revoked by a writing (not a will) signed in the presence of 3 witnesses_ In case of wills the witnesses must sign in presence of testator_ here he must sign in their presence. If not conformable to this requisite, the writing is no revocation 3 Mod 258. 1 Show 89. Carth 79. 2 Atk 272. 1 P.W. 343. as if he signs in the presence of two only.

The 3.d class. is by tearing, cancelling blotting & obliterating_ which I will consider in Lecture. 6th

Lewis.

This Cause of the Test. has made no material difference in the Law for it wd. be so at the C. L. because the tearing &c. wd. manifest an intention to destroy it. The only difference the Test. makes is, that a more strict adherence is observed to the words then at C. L. - for it is said the smallest tearing &c will operate so as destroy the will - but here there must be an animus revocandi - & I think the distinction is nothing - The will is worded at C. L. with the same degree of tearing &c if the intention is to destroy the will. Coop. 5 &c.

It is clear that if the tearing &c is done by accident, it is no revocation - or if done under a false impression of a fact - it has no effect. Parol Evidence must be admitted to prove the intention of the Testator in such case. Common sense is to be consulted & the circumcumstances of the case to be considered

1 P. W. 346, 2 Bl. R. "Devise" p.

If the intention was to destroy it is no matter how slight the tearing &c - it is a revocation e.g. a man made a will & was dissatisfied with it & it was well known he intended to make another - He directed a female in his family to bring it to him & she slightly tore & threw it on the fire, but it fell off & she preserved it - it was slightly scorched - The Qu. was whether this was a revocation? It was decided it was, & as the intention was evident that he also intended not to die intestate, it was determined to get this out of the way (Coop. 812.) (I mean the case of having able to make another.)

There is an insolated case in the Books of this kind. A testator made some obliterations in his will - such as the Ct said made no material difference in the devise. The legacy of 400ff he altered to 450. the word daughters he altered to daughters (because he had another born:) Now the difficulty was that the witnesses cd not ~~swear~~ Swear that they had witnessed the Execution of that will, as it was altered subsequent to the Execution. But the Ct established the will. He might have made a alteration by a codicil & then this objection cd cease. - Sutton vs Sutton - in Comp on 1st R.

Republication of Wills.

A will may be revoked as we have seen - but a republication of the same will, will set it up again - & I have no doubt but an express revocation may be done away by a re-publication of the will established. The law in Engd as to republication is the same as in M.S. for it stands upon the devising clause of the Stat. -

As there are certain requisite necessary to a good will, so there are requisites to be observed if in a republication. The republication must be attended with the same requisites & ceremonies as cd be necessary to pass real estate by will at first.

Real property purchased subsequently to the will, will not pass under it - but personal property of all kinds will except leasehold Estate in Land - this, the personal property Stands on the same

footing as d and p. if such property as obtained after a will made. it will not pass, except it be republished.

This republication makes the will operate precisely as if made at y. time of republication. If T.E. republishes his will, which gives all his real estate in Litchfield to A. all he has there will pass. but a republication after the land purchased will not pass. but a farm out of this town will not pass. Bro. E. 493. Com. Di. Devise, p. 381. 3 P. W. 329. 1 Ves. 437. 1 P. W. 275. 5 Co. R. 68.

Before the Stat. of frauds & perjuries (i.e. the Stat. of Devises) any words spoken amounting to a republication, with reference to y. will, was a good republication of the will. But since the Stat. no express republication can be made by Parol. Lands cannot pass by parol, & the ground taken is, that the republication is y. same as a new will. But I dont see that this Stat. has made any difference in the Law, for under y. Statute of Wills. the will must be in writing at the republication, as well as

A republication then must be made in writing & executed according to Stat. frauds &c. But y. will need not be re-executed. The former execution is good. All that is required is, that the republication be duly executed. Com. D. 655. 2 Atk. 589. 1 Ves. 440. 3 Mod. 78.

But there are no cases about what time the Testator must continue. The Qu. is whether y. execution of a Codicil will operate as a republication of the will, if executed according to y. Stat. of frauds &c. It is a rule laid down that a codicil so executed will republish y. will. But a doubt

arose whether it was not necessary that there be a clause of republication in y. will & codicil. It was once holden necessary. 2 Vern 498. And was settled to be a republn if such clause was inserted.

It was Question vexata. whether a codicil legally executed without such a clause was a republication. Sr. Hardw. said that such a codicil was that it was a republication, on the ground that the codicil contemplated the will. 3 Atk 180.

Another Qu. arose whether it cd make any difference whether the codicil concerned real or personal property, if duly executed according to y. Statute. If Sr. Hardw's principle is correct, it is a republication. for it was duly executed & made in contemplation of y. will. In this case the codicil was annexed to the will.

But suppose the codicil is not annexed to y. will tho legally executed. does this alter y. case? Does not a man as much contemplate his will when y. codicil is not annexed as when it is. Certainly I think, & I suppose it makes no difference (as to the opinion) whether the codicil is annexed or not, or whether it respects real or personal property, if duly executed. There are contrary decisions however. Cro. E. 493. 10. W. 168. 1 Burr. 514. Com. R. 381. 1 Ves 437. Comp. 188. Auth's that y. codicil must be annexed 1 Ves. 421. 1 Ves. 489. the current of auth's, y. other way.

Tho the codicil republishes the will, yet it gives it no new qualities. If the will turns out to be defective, it seems the codicil does not add it. It republishes it - but republishes it, as it was. (Pr. Ch. 1 P. W. 275 2 Vern 597 2 Atk 399. 3 Atk 170. as to republn generally.)

You will find a single case, (& none to contradict it) that if a minor makes a will of real property & republishes it after he comes of age, it is good. 1 Sid. 162. – The objection was, the will was void ab initio, for a minor c^d. not devise real prop^y. – But the decision was ut supra. I shall next treat of y^e admission

Of Parol evidence to explain a will.

With regard to the admission of P. Ev^{ce} to explain wills, there is but little difference in the Law when applied to y^e case of deeds. The rules are very nearly the same as to both. They differ in but one respect, which I will notice hereafter.

It may be laid down as a general rule, y^t no parol declarations of the testator of his intention at the time the will was made, are admissible to explain enlarge or give to y^e will a different operation than the words w^{ld} import. But the declarations of the testator of the manner in which he meant to dispose of his estate &c. which were made before the execution of the will are admissible – E.g. If a House is given to Betsy, no parol evidence will be admitted to shew th^t he meant Sally, from declarations made at y^e time. – But that he had always said he sh^d leave that house to Sally & that his declaration to the scrivener was to give it to Sally, are admissible. 3 Co. 68. 2 Vern. 98. 2 P. W. 316. Ibid 18. 2 Atk. 216. Ib. 373. Pow D. 348.

Again – The following rule applies as well to Deeds as to wills. viz. That Parol ev. will never be admitted to shew the terms of a contract, which contract is required by Law to be in writing & sealed, or

may prove that contract in another way - viz by existing facts - As if A. sh^d^ give B. an absolute deed of Bl. acre for 100$, now he can't shew by parol that there was a contract that this sh^d^ be a mortg^e^ deed. It is a case which w^d^ give room for fraud &c. & it is dangerous to trust to y^e^ mem^y^ of any one as to y^e^ ^terms of^ such a contract. But you may prove this a mortg^e^ deed by proving grantor has always been in poss^n^ - received y^e^ rents & profits of y^e^ land, has p^d^ no rent to y^e^ grantee - the grantee has a note ag^t^ y^e^ grantor the consid^n^ of y^e^ deed, & the grantor has p^d^ the interest. Now from these circumstances it is evident the deed is a mortg^e^. This same doctrine applies as well to wills, as to deeds. & you proceed in y^e^ same way. -

Whenever parol testimony is admitted, it is a rule (l^d^ down to be universal by Elementary writers), that no fact can be proved by parol unless it stands well with the will - As where the testator gave a Legacy "to y^e^ 4 children of E. B." - but E. B. had 6 children - 4 by one hus^d^ & 2 by another - Now parol evid..... was admitted to prove she meant to give it to the 4 by the same father & not to y^e^ two by another hus^d^ This stands well with y^e^ will. If she says "to the children" of the rule w^d^ have been otherwise & the property given to all y^e^ children - for to prove she meant the 4, w^d^ not stand well with will. It is an agreed point that where you meet with an ambiguity on y^e^ face of the will, you in

not to resort to parol Evidence to prove the intention - the will must fail before this can be done, [There are exceptions to this rule] - This is called a patent ambiguity. But if the ambiguity arises from something extrinsic the rule is diff.t & parol may be admitted - this is what is called a latent ambiguity. As if the testator gives 100£ to his son Tom but he has two sons of y.e name - parol ev. may be admitted to show to which he meant to give y.e legacy - or to the charity school in A. there being two. But if he gives 100£ to one the children of J. S. he having a dozen - here you cant prove which child was meant. But if he gives it to J. S.'s child. it w.d appear to me that this is a patent ambiguity - for it does not arise till it appears that J. S. has more than one child. 2 Ves. 216. 1 P. W. 674.

Lect. 7th

So where the testator gave to "A B" & there were two persons of that name, parol was admitted to show which of them he meant. 1 Salk 7. 6 Mod 199.

The general rule is that we cannot presume the intention of the testator - as where he gave a legacy to Mr ____. Parol cannot be admitted to show whose name was intended to fill the blank. 2 Atk. 240.

The testator gave property "to his children" & equally - to A 100£ to B. 100£ &c but there was one which he did not name, but who was a favorite child. The Que. was whether parol c.d be admitted to prove he had a child which he had not named? It w.d do no good to prove the existence of this child it w.d (1 Cox R. 155 5 Co. R. 28. 2 P. W. 137.) be irrelevant testimony.

But tho' the Ct admitted the proof, as it stood well with ye will, they admitted them all to take equally, as if none of them had been named.

First suppose the ambiguity is patent: i.e. in reading the will the doubt strikes ye mind. No Parol Evidence can be introduced to explain it - & if ye intention can't be collected, the will must fail. 2 Bulstr. 180.

If this ambiguity arises from a word of equivocal meaning, Parol evidence may be admitted. But if the ambiguity arises from ye sentence the rule obtains yt it can't be explained by Parol.

There are cases of false description, where parol testimony has been admitted to prove who is meant - (Now here it is said Wills differ from deeds, as Parol cannot (in Deeds) in such case be admitted - if this is so - it is the only difference. -) E.g. where the testator used to call a person by a nick name & gave a legacy to him by that nick name - the Ct. let in Parol to shew that he was accustomed to call him by a nick name. 2 Atk. 240. 1 Atk. 410.

In the last authority I think the devisor had forgotten the name of the devisee tho' his child - He gave it to "Charles my son, now serving with ye Duke of Savoy." His name was William - the Ct suffered Parol Evidence to be admitted - the description was correct, but the name was wrongfully given. Such evidence wd not be admitted in case of Deeds as you may see in 2 Vern. 218.

Devises.

Observed parol might be admitted when an Equivocal word was used and not when the doubt arises from Equivocal sentences. 2 Vez 216.- There is a case where the word puero was used in a will. In Latin it meant a Boy classically used - in Law Latin it meant either a son or daughter - It became doubtful whether he intended to use it in its classical or Legal sense - The Ct admitted parol to shew his Lordships intention. -

The circumstances of a family may raise a doubt as to the meaning of a word - In such case parol must be admitted - E.g. testator devised to "A & his children" Now what are the circumstances? If A has children it is an Estate in him & them jointly for their lives - But if he had no children it is an Estate tail in A.- 6 Co. R. 17.- (Parol evidence thus is admissible by reason of circumstances of his family) In the former case the word "children" is a word of purchase, in the latter of Limitation.

The circumstances of a mans Estate may alter entirely the course of the will - & parol must be admitted - The word Estate for a long time did not pass a fee, but now it does - E.g. A.D. gives to T.N. "all my Estate" on Condr of his paying certain Legacies - Now did the testator intend to give N. an Estate for life or in fee? According to the then construction of the word Estate, it would give only a life Estate But the intention doubtless was to give a fee since no words of inheritance are used - for it might be a hard bargain for the devisee to take only

life Estate, & have an interest in it not more than a week or a day & be obliged to pay the Legacies.
3 Keb. 49. 3 Bur. 1898. Parol was admitted to prove circs of his estate.

It now appears to be settled that parol Evidence, of the circumstances of a mans Estate, may be admitted, when, from it the intention may be collected. But you are not to contradict terms or apparent import of the will by parol Evidence. (1 T. R. first pages - here you will see the word 'Estate' ex vi termini passes a fee simple.

But the doctrine has been carried further. There was no ambiguity in the words but the fact is if the will takes effect according to the plain import of the words, it will render the devise ridiculous. & the will plainly contrary to the testators intention which can be proved from certain facts, if they can be admitted. E.g. J. S. gives to T. N "my house called the Bell Tavern". What Estate did T. N. take? according to a settled rule, if the object is per se described the grantee takes an Estate for life. Now it happens that T. N. had already an Estate for life in the Bell Tavern, & Stiles had the reversion in fee. Now from these circumstances it is apparent the testator intended to give a fee. & parol Evidence was admitted to prove the devisee had a life Estate. The Q. arose between the heir at Law & the devisee. The only difficulty was as to introducing parol Evidence as the words 'Stiles & wife had in the premises' 1 Salk 234. Pow. D. 509. 2 Str. Ray 831. Pow D. 514. 1 Coby 472.

In Chy. Ca. 472 ante. a woman gave "Stock enough to raise 100£ to A. & the same to B. & the same to C. - Now men of business understand this to be stock enough to raise the interest of 100£ - but it appeared she had but 120£.

In 1 Bro. Ch. Ca. 472. (supra), a woman devised "£100 Stock in Long annuities to B." 100£ Do. to C. 100£ Do. to D. the rest & residue of her estate to the Genl. use. her family connections) - The apparent meaning was (according as men of business wd. construe it) stock enough to raise £100 interest to each, & the residue &c. imperfectly. But the difficulty was she had but 120£ interest coming in from Long annuities - from this it seems she cd. not mean that they shd. have enough to raise 100£ int. She must have meant to give them simply 100£ tho' this was contrary to the ordinary meaning of the words used - but the circumstances of the case being proved showed what she meant & the Court so understood it, & directed a sale to raise the 100£ apiece out of the long annuities. In such case parol is to be admitted, for if the rule requires the construction which the words impose it renders the devise & devisor ridiculous. This was an important case. it was carried to the house of Lords - the opinions of all the able common Counsel, & that of all the Judges were taken & on the final [illegible] the decision above was confirmed with but few dissenting voices. This case may appear to intrench upon the rule, but so far parol must be admitted.

The following cases will corroborate this opinion - E.g. The Creditor makes his debtor his Exor. according to the general principles of Law the debt is released - But this debt is assets to pay Legacies - All then that is meant by the rule is that, after a man has pd. all debts &c. the debt due from him is forgiven. The case was this - Parol was wished to be introduced to prove the testator intended to release the debt due from the Exor. It was not admitted for the construction of Law is that it must be assets if wanted - therefore it did not stand well with the will.

Again - the testator devised his land for the paymt. of debts - what is meant? now I shd. suppose he meant to save his pers. propy. - but this is not the construction - it is, that it is to be sold on failure of suffict. pers. propy. to satisfy creditors. It was contended that Parol ought to be introduced to show he meant to save his pers. propy. But the legal construction is otherwise - tho' very likely the intention was to save the persl. propy. But parol, and

be admitted, as it wd contradict the will – or the legal con-
Talb. 240. 1 Stra. 261. Com D. 522. struction given on such case.

Again – It is a clear case, & about which there is no contention at Law or Equity, that where the Ex'or has no legacy given him in ye will, that he is residuary legatee (for the surplus of ye personal estate). This is the legal operation – It was contended that Parol ought to be admitted to prove the testators intention otherwise, as he had given him property independently of the will. But it cd not be admitted, because such evidence wd not stand well with ye will. 2. Bac. ab: 428.

Decr 8th

Parol testimony is such as is constantly introduced to rebut an Equity. A great part of the business of Chy is to enforce contracts (or articles implied in equity) of which a Ct. of Law are ignorant. A Ct. of Law goes to a certain extent. a Ct. of Chy then takes up the principle & applies it to cases which they consider as falling within ye reason of that principle. The construction of an instrument in Equity is often very difft from what it is in a Ct of Law. Out of this arises an Equity, as in cases of mortgages. after the day of paymt has elapsed there is no redemption at Law. but a Ct of Chy gives ye mortgagor an Eq. of Redn. Now in this case parol proof may be introduced to rebut this Equity. So where property was devised in trust to pay debts &c if there is a surplus a Ct of Law can't compel the trustee to pay it over. But a Ct of Chy will oblige him to pay the surplus to him to whom the land wd have gone. This is an Equity.

But you may introduce parol testimony to prove that the intention of the testator was to give the surplus to the trustee after performance of the trust. In other words, parol may be introduced to restore a legal construction. & for this purpose his declarations may be proved by parol.

Judge Blackstone says, Courts of Law & Cts. of Eq. have given different constructions to same instrument this is certainly correct.

This trust is called in Law language "executory trust". It may be exemplified by a notable distinction between the Cts. of Law & Eq. The rule of Law is that where a man is appointed Ex'or, has no Legacy & no one is appointed residuary Legatee, the Ex'or is himself entitled to the surplus of the property after payment of all debts & Legacies. But a Ct. of Eq. say that if the testator had given the Ex'or a Legacy, it shall be deemed the intention of the testator was to deprive him of the residuum, & the same distributed among the Next of Kin. Now this is the rule. But Eq. will suffer parol evidence to be introduced to show, that notwithstanding the Legacy, the testator intended him as a residuary Legatee. & this is the rule, whenever the Equity arises in a Ct. of Eq. it may also be rebutted in that Ct. by parol Evidence.

Again. it is a rule in Eq. that whenever a man mortgages Lands & dies, the heir at Law has a right to redeem. But this Equity is rebuttable by shewing there was no intention that the heir should

the privilege of redemption.

So also it is a rule in Equity that when the mortgagee dies, his heir has a right to call upon the Ex[r] for money to redeem y[e] mortg[d] lands of his ancestor on the ground that the pers[l] fund in y[e] hands of the Ex[or] has been increased by the mortg[e]. This is an Equity in favor of the heir — but it may be proved that it was the intention of the ancestor that his heir sh[d] not have the aid of y[e] pers[l] estate to pay y[e] mortg[e] debt — but that he sh[d] take the real estate cum onere. — Pow D. 524. to 528. 2 Vern 253. 677 Talb C. 79.

There are some cases however, where there seems to be no necessity for the introduction of parol evid[ce] but it is done — E.g. a man gives A. a legacy of 10[l] in the same will in a dist[t] part, the same legacy is agn[n] & is given — now the rule of Law is that it was the intention of the testator to give but one legacy — but if they are given in distinct instruments the Legatee shall be entitled to both — Now I see no reason why parol testimony sh[d] be introduced to prove that in the latter case that testator intended the Legatee should receive both. for being in dist[t] instruments the construction of Law is that the Legatee is entitled to both But parol is often adm[d]. 2 L Ray: 1324. Cas 2 526.

Parol proof may also be admitted to prove that what is given in a Devise is intended as a satisfaction of a covenant or other obligation of the Test[r] &c. As e.g. where a man covenants to settle on

his wife 1500$ owed & showed that by Law she was entitled to be made a wife - & gave her 1500$. The Qu. was whether the Legacy was given in satisfaction of the Covenant - Parol proof is admissible to prove that fact. Powr. D. 529. 2 Ves 323.

Parol may admitted in all cases of fraud.

You never can introduce Parol evidence to vary but a legal construction. as in case of Legacies. the legal construction is to be considered Residuary Legacies under circumstances - Now you cant introduce parol in a Ct. of Law, to rebut this construction.

Again - Parol Evidence can never be admitted unless it stands well with the instrument.

Of the conferring a power to another to dispose of property.

This person thus empowered is a Trustee & he may execute the trust by Deed or by will - An Ex'or usually has this power.

There is a distinction between the cases where the person has a mere naked authority, & where the authority is coupled with an interest - in both cases the person is a trustee In the former case the legal title is in the heir, in the latter in the trustee - Where the Ex'or has authority to sell merely, the trust, it is said, is a naked one, & the property in the heir - So too where there is a power given to sell, the authority is a naked one, as in y above cases Cro C. 382. Comp 464. 2 Ch C. 113.

But I have no doubt but the power may be so given as to vest the legal title in the trustee - as if he gives him the land &c to sell &c & also a right to take the rents & profits this settles the point -

If the devise is to the Exr in to sell, it is an authority complied with as an interest - if it is that trustee shall sell & gives him power to sell, it is a naked authority - & nice & useless distinctions.

When there is a mere naked authority only it is considered only as a power of attorney. If then the authority is given to two, one cannot sell - for a power of atty must be executed jointly by all included in the instrument. The Exrs in such case does not act as Exrs, but as appointees.

But the doctrine has been relaxed - for where A B & C were Exrs of the testator's "Exrs" were empowered to execute y trust, one being dead the other two were holden to satisfy the direction which was that his "Exrs" sh^d &c - But where the direction was to my 4 Sons in law - 3 of them sh^d not execute the trust - (Cro E. 26.) tho one was dead - for if the word "Exrs" were used & there were but two & one dies, the other cannot perform the trust. Hob. 524 - or (Cro E. 524.)

It is a principle established in Eq. that who ever has this power may be compelled to perform the trust, if they once undertake to act - Eq cannot compel them to accept - tho if they refuse, they may appoint persons to supply their places & execute the trust - the Ct will appoint the heir to sell in such case as a matter

of course, if he refuse some one who will act will be appointed: 2 Lev. 304.

All the differences between a naked power & one coupled with an interest is, that in the latter case the trustee has the legal estate till the sale - in the former he has not.

It has been determined that where an Estate is given to Exors to educate Children, they have an interest as well as a power - it is an authority coupled with an interest.

Lecture 9th.

The Stat. of Uses.

There are two of the States which have adopted the Engl. Stat. of Uses - others have not. Those who have adopted it, have adopted also the Engl. construction. Those who have not adopted the Stat. are governed by the law, as it was in Engl. previous to the Stat. of Uses.

You recollect that I have formerly observed, observed that it was customary formerly, to create trust estates, & that a Stat. was made which drew the legal title to be immediately vested in the cestuy que use, on the moment it was conveyed to another for his use. Before this Stat. the Ct. of Chy. a. compelled the person to whom the land was conveyed to give the cestuy que use the rents & profits, & finally to convey the fee simple to him.

In those States, however, where the Stat. of Uses is of no force, this doctrine cannot prevail. The trustee still holds the legal title, & the cestuy que use

be possessed of only the beneficial int.s. It is often very useful to create a trust estate for beneficial purposes, as when a man has a spendthrift son he can create a trust Estate for his benefit; trust the title in a 3d person. But this Stat. has cut the doctrine up by the roots apparently where it is adopted. How then does it happen that where it is adopted, trust Estates still exist & are very common? The Stat is evaded. It was done in this way. A conveys an estate to B. to hold for C. now the Stat. speaks of the legal title resting in C. But if D. was the person intended to receive the trust it cd be conveyed to him (i.e. for beneficial interest) by adding another person. As A conveys to B. & his h.s to hold in trust for D. Cts of Law said this was a good trust Estate. for the reason (no doubt) of giving rise to trust estates again. 2 Lt. Ray. 872. Moore 79. 167.

These Estates are altogether under the Cognizance of a Ct. of Chy. & they have been so managed that they have become a noble System of Jurisprudence & no injury results from them. Chy. can compel a conveyance by a trustee when it is proper it should be done.

The several cases where a Devise becomes inoperative. The first case (I have mentioned) is by revocation. A Devise may also be inoperative by uncertainty. Moore R. 868. E.g. A Devise to the right heirs of my name & possibly part of Yorkshire. The Ct. cd not determine his meaning so also

(Devises.)

where he gave "all my freehold to my wife for 5 years, & if any of it is out of freehold" &c. - this last clause was uncertain & will &c. did not take effect. - So a devise to the "best man in A." - or the "honest in B." &c &c

(But a will may become inoperative by something dehors the will. - if it can be proved what his intention was, it may be proved (& by parol.) but the best & fullest proof can be obtained. As if he gives "Bl. acre", to A. & he has two farms of that name - here if there can be no proof to shew which was meant, the devise must fail. -

If the devise is contrary to Law it is inoperative - as where he attempts to create an Estate unknown to the Law. E.g. A devises Bl. acre to B. & his heirs forever - & cond. that he never aliens it - now it is Qu. whether this estate devise is void or not - The ground on which they say it is void is, that if the Devisee has a fee & power of alienating the intention is thwarted. But it is settled that the devise as to the cond. is inoperative & B. will take a fee. So if he devises an Estate to A. & his heirs male forever. Now there is no Estate descendable to f. heirs male (or female) & his body. This is an attempt to create an Estate of which f. Law is ignorant. What Estate will result? The bad part of it, is the word "male" this will be rejected & the devisee take a fee. I think (Pow D. "inoperative") tho there are devises which may be valid. take as by an Estate for life. I think it where

consonant that to the intention of y^e testator to consider it a fee simple. for it is evident he intended to create an inheritance. a descendible estate. L^d Co. It has been decided that such ~~estate~~ words will pass a fee tail. by substituting the words "of his body". H. Dav. 7^th^ have been whether it is an Estate in fee or for life

A Div^r. whether if a man devise (as above precisely) it creats a fee tail. The Ct. of Exch. decided it, & confirmed the opinion of the Sup^r Ct. above

It has now become the Law of y^e Land in Eng. that ~~estates~~ estates may be granted tail, into fee simples. Seems formerly.

There has been an attempt to devise in this way. "an Estate for life from generation to generation" The intention of y^e testator was evident to create an Estate tail. but it was supposed to be contrary to good policy & declared void.

Again. it is a rule that if a testator devises to A what by Law will be his name taken, the devise is inoperative. As if he devises his real Estate to his Eldest Son. He will take as heir & not as Devisee. This is not of much importance now. This was formerly of great consequence. the rule is founded on y^e principle that y^e real Estate was liable to certain duties which were evaded by devising, & allowed.

A Devise may become inoperative by the Devisee refusing to accept the devise. as if it is clogged with debts &c. He cannot be compelled to accept. It is said that assent in the Devisee is necessary to vest the property. But this case by y^e Civil

contract executed will bind the grantor - & is good title the grantee disputes - a conveyance to an infant who is of age is binding - Assent is presumed.

When it is evident that the testator has done that in his life time which he devised to be done the performance is a satisfaction of the devise & the will as to that, is inoperative. As if he devises 400£ to his son to build him a house, & afterwards recovers & builds the house for the son & advances the amt. of the Legacy in money, the Legacy is adeemed. Powe 95. (Pow. Lt. inoperative) —

A devise may also become inoperative by operation of Law, where the propy. is liable for the payt. of debts - In such case a man cannot by devising place the propy. beyond the reach of creditors - if necessary it may be taken & the devise fail.

Who are incapable of devising.

Before the Stat. of H. all mankind were incapable to devise except where they were by custom allowed to devise. The Stat. says "all persons" &c. - An alarm arose from these words fearing some were included who had not power to devise. But the alarm was groundless & Idiots &c. &c. cd. not devise because they cd. not contract. The intention of the Legislature was to give the privilege of devising real property to all who cd. before devise personal propy. The only difference was as to infants, who cd. devise personal propy. by that Stat. they cd. not devise real, tho' of full age, on the ground of want of discretion.

The Devisor must be of "sound mind & memory." The Quest. which may arise from this requisite are Ques. of fact to be left to y Jury. It has been the rule gen.ly laid down that if devisor can take ordinary care of his prop. y. &c he may devise it. But no certain rule can be laid down. It is a subject to be enquired into, & depends upon the circumstances of y particular case. They may be of delirious as to many circumstances, but of sound mind as to his property. in such case the will will be good.

With respect to wills the Law is more scrupulous to prevent duress than in case of contracts. If he makes a will to procure ease & respite from the solicitations of those around him, the will is void. You are only to prove (in ordinary cases) that this was the fact - & it will be set aside. But still if such is the fact & the testator recovers & afterwards agrees to y will, it is good.

Sect. 10th

There has been a Que., much contested, whether a married woman can devise. The Eng. Stat. 34 H. 8. declares she shall not devise Real Prop.y But the Que. is whether she is disabled at C. L. by coverture to devise real Prop.y This Que. arises where the Stat. H. above is not adopted. The objection to her devising is that the hus. is entitled to the usufruct of her estate, & to a tenancy by the Curtesy. But it is not contended that the estate of the wife will be liable to these

claims of the h^d. She certainly cannot devise so as to affect his marital rights. The clause in the Stat. allowing Devises allows it to all persons "legally capable", - this brings up the Qu. & recourse is had to the C. L. to ascertain who are "legally capable". It is urged that in those States where they have copied the Stat. of H. & enumerated the persons disabled, & omitted that of coverture as one, that it was intended to extend the privilege to Feme Coverts. But I think by this is meant only that the intention of the Legislature was to leave the privilege as it was at C. L. - What her privilege in this respect was at C. L. is open for discussion.

What construction is to be given to the clause "legally capable"? The object of the Stat. is to put Real Propy upon the same footing as pers^l Propy. It means then that all persons legally capable of devising pers^l may now devise Real Propy. This is the obvious & the only rational construction of this clause of the Stat. - The whole Qu. then turns on this: Could a married woman ever devise pers^l Propy. If she c^d she may devise Real - now if not allowed to devise pers^l propy before the Statute of Hen. -

I think the truth of the case is this - In the 1^st place, if we were to conjecture, whether femes covert were allowed to devise before the Norman system of feuds, we must conjecture (they did) [illegible]

Because whatever within the ancient Britons who allowed of devises formerly had were derived from the Romans. It is probable from this that married women did not devise – But there were some Saxon customs remaining under which devises were allowed of real propy. There are two cases where the qu. was, whether under this custom a feme covert cd. devise? And it was decided that the wife cd. devise. These are the only cases.

But we can collect an argument to prove this right of devising real propy. from ye fact that she was allowed to devise persl. propy. The consent must necessarily be free, because it must be in those cases only where the property was solely hers.–

We find it laid down in Bracton that a wife cannot generally devise – this implies she may sometimes – & therefore where the husd. gave her liberty to devise, the devise was good. But in all these cases you will observe that the husband's propy. by her devised was the propy. of her husd. This then does not infringe the idea that the wife may devise property of her own without his consent. And there is one case where, to this day, she is allowed to devise & that is certain species of paraphernalia. And further where the husd. endowed her of certain land property ad ostium ecclesiæ. This was hers, & he had no control over it. Here then we find an instance where she had persl. propy. of her own. During that period it was a Saxon right. The law then is, [illegible]

Arch Bishop Stafford & Lyndewood were two Eminent Lawyers of the day in which they lived, & they lay it down unequivocally that she is entitled to the privilege of devising all the property which she owns independent of her husd. & this without his consent. - & also deny that such is similia juris to the contrary.

It thus appears established that she cd devise pers. propy. if the rights of the husd were not infringed. As I mentioned to you the wife cd make a will during the life of the husd. & if he did first, the rationabilis pars, of his propts. which she had a right to devise cd by her death. descend to the devisee. The Qu. then came up since the Stat. whether the wife cd devise her real property, (or her rationabilis pars) & the Ct. held she could not devise - for she was disqualified, by coverture, declared to be such by Stat.) at the time of executing the devise - & nothing cd remove this disqualificn for it was a positive one. The consent of the husd wd have no effect.

But this point I conceive to be settled, if authy. can settle it. It is settled that since the Stat of Wills she may own separate property & since this Stat. there are numerous cases & not one contradicting the rule that she may devise her real propy. so owned separately. But the objection to this is that this is done only in Chy. This is no objection - for a Ct. of Law can never alter the Laws, & allow her this privilege if positively denied her by Cts of Law. Chy have

have cognizance on this as over other cases of Legacies Wills &c

I find a case where a feme covert devd real & pers. prop. which she had to her sepa- rate use, & the Ct. of Chy declared the devise as to the real prop. not good, on account of the St. of Frds. Had not this been in the way the de- cision wd have been otherwise.

There was another case where the Hd & wife entered into articles of separation, & he covenanted to give up his right to the use of her real Estate, & also that if she wished to sell this prop. he wd bind her his name in the convey.ce. She afterwards sold the Est.e & he did not join. She died, & the Qu. which in the convey.ce was good, arose between the Grantee & her heir at Law. & the Ct. decided the convey.ce good, for no marital rights of his own affects for he had released all his right & interest in the real Estate by covenant.

So, on principles of Eq. L. the choses in action of the wife are not his, tho' reduced to poss.n by the Hd. If he or she dies before this is done the wd can never claim the ~~Est.e prop.ty~~. Now suppose during cov.e she devises a bond to H. & the husd dies before he reduces it. The devi- see will take the under the devise. If cov.e was a disability it cd never be done.

So if she devises property which she holds as E.T.

the devise is good; & the Exor which she appoints will administer the property.

These cases appear to me to be unopposed. But it is also said as an objection that the H. & wife are One person. But for a thousand purposes they are consid. as two. & she is allowed to act. This is figurative language. Judge Bl. says her existence is merged in that of her husd during covt. If this were true in the extent the idea implies, it wd be impossible for her to devise. But she is allowed to execute a power of atty. by deed; she is allowed to convey her real estate by uniting with the husd in a fine & recovy. But cant she convey it without his uniting with her? Yes. if he does not dissent. & the reason that his assent is necessy. is because otherwise his rights wd be affected. From this it appears she is allowed to do many acts, tho not actually merged in the H. Another objection is that femes covert have no wills. But this is not true, for were it true she could never be made guilty of a crime. So in case of adultery with her, the old form of action was, against H & Batty. or her person, committed by her wife. So no truth in this pretitious maxim.

But the great objection is this: it is urged as a reason for not allowing her to devise, that she is under the coercion of her husd & her wishes will be frequently thwarted by his compulsion. This argument has some plausibility

at first view - but like many others it goes to prove too much. It goes to prove that she cant convey - but this she may do. Now why shd a devise to convey stand on a diff: footing - in this case there is no reason for it - She is as much under the coercion of the H. in a case of convey: as in that of devising - tho in the former case it is sd she is guarded by a private ex.a whether she does it freely or not. But this is no guard in fact - for if she is refused by the H. to convey, she will also be compelled to acknowledge & convey: and willingly.

Again. Say they if this devise of the wife is good when made without his consent, if no marital right of his are affected, why can she not convey her lands, the interest to commence, after his use - first is determined? The answer is that a free hold in *presenti* cannot be created to commence *in futuro* - this is an unyielding maxim, & furnishes an answer to the objection - But they ask why cant she make a will & limit a remainder, aft: the life estate is determined? Then is another maxim which prevents her doing this, which is that the remainder & the particular estate on which it is limited must be created at the same time - & this cannot be, for the Est: of the hus: commences on the moment of marriage, & that of the rem: man not till her death. *

1 Rawe R. E. L. 307. 111. 101. 4 H. 73. Bracton 60. Lyndwood 173. Year Books 5 H. 6. p 31. 39. Brooks Devises 27. 34. Cro C. 2 (2) 376. 2 Ves. 190. 1 Bro Chy. 10. 2 Ves 675. Ves 303. 518. 3 Atk. 709. Pre Chy. 205. 1 P. W. 126. 2 P. W. 316. 1 Vern 245. 2 Vern 253. 1 Mod 211. 218. Moor R. 346. Anders. 92. Rob Ab. 608.

* By Stat in Car. a feehold may be created to commence in futuro - & how I am satisfied that her convey: without his consent & her good.

Devises.

Sect. 11th

Who may be Devisees.

Almost any person may be a devisee. There may be Stat. disqualifications - these you will find in the Sts of your several States - Want of discretion is never an objection - an idiot or infant may be a devisee - Devises in such case stand on the same footing of a grant, & the devisee like a grantee may waive the gift.

Property (Real) devised vests immediately in the Devisee - & Legacies it is diffd - Pers: property vests in the Exr or he who has it to pay debts &c - but the land devised vests in Abeyance in the devisee - the heir at Law has no title. If a breach is committed on a devise, the devisee must bring the action, not the heir.

Coverture is no disability in a devisee tho the H. may disagree to the devise & defeat it if there is good reason for his so doing. He cant dissent for mere whim & caprice. But if the devt is encumbered with debts taxes duties &c he may dissent on the ground that his marital rights may be affected. Therefore when the devt was to her, her int to commence after his death, he was not allowed to dissent.

It was once a Qu. whether the H. could devise to his wife - or the principle that he and the one are it wd be absurd to devise to his

to his wife, because it w^d. be devising to himself.
But she is capable of taking as Devisee, for
she can hold real propy. & this is always a rule
that whoever can hold ~~at~~ an Estate may be
a Devisee - She can't take pers^l. propy. because
it w^d. be absolutely the hus^d^s. on the moment
it vested in her. But she may take Real Est^e. under a Devise:

Neither is there any thing which prevents
a hus^d. from conveying real Est^e. to his wife by
deed. Still it must be done by the Hus^d^s. con-
veying to A. & A to his wife, & it w^d. be good.
Now it is not ag^t. Law to convey to a wife for
if it were, the Law w^d. not be defrauded by
allowing such a convey^ce. thro the medium of
a 3^d. person. The maxim prevents the h^d. from
conveying directly to her, - i.e. that both are
one person. But in Eng^d. under the Stat. of uses
one deed will vest the legal title in her. The
convey^ce. is made to A. - the Stat. then says if
on the moment of creating the use the legal
title vests instanter in the use person. Hence
then the moment the deed is made to y^e. 3^d. pers
on, that moment she is seised of the title which
is conveyed to such 3^d. person.

It has been loosely said that Aliens
cannot be devisees - but the convey^ce. is not strict-
ly void, for were it, the title w^d. not go out of
the Devisor - The alien will take, but on office
found, the Estate w^d. be forfeited to the king. (g)

he is not disturbed the land will descend to his heirs, & if a trespass is committed on y. Est. he may maintain an action for it, before office found. 2 Ves. 268.

Illegitimate Children may be devised, tho they labor under some difficulties in consq. of the maxim that they are filius nullius. this is a foolish maxim & it might as properly be said they were never born as to say they are the children of no body. They cant take by the name of children or sons &c. but they may take under such a name as they have acquired by reputation. If a man devises "to his eldest Son," an illegitimate child under this denomination cannot take. 1 P. W. 529. But the devise if made to an illegit.e child by their names they will take. they never can take under the word Son, tho it is evident the intention of the testa. was to give it to him. the maxim above prevents him. There is one case in Moor R. where he was allowed to take in such case. tho the current of auth.s is as above.

A man made a will & devised to his three children (who were illegitimate.) on his death he had also 3 legitimate children, & the Question which of them were to take. The objection was y.t under the term of children they were not described, but it was decided a good devise to the illegitimate children. & that they were well described. 1 Atk. 410.

Devises.

An Estate cannot certainly be devised or granted to an illegitimate child unborn. & all the cases where they have been allowed to take was on the grounds of a sufft. description given them.

It is no objection that the person intended to take in the devise is uncertain & that it is necessary that some thing happen to render it certain - for a devise may be made to commence in future - as to the child of his who shall first become married - This cant be in a grant because it cant be made to commence hereafter.

There has been much contention respecting Devises made to persons not in Esse. I shall not enter into this thing, for it is now well settled. (See the Note in Fearne 332. to 428.) It is settled that the person tho not in Esse at the time of the devise may take - as if made to a child unborn. The only requisite is that words be used which will vest the Est. whenever the person comes in Esse - but for if you use words which vest it (if possible) before born, the devise is void - & this is the universal principle in every case. This great Rule then is said to rest on the principle above -

If words are used which signify the person intended to take either by name or title, christ. or sur name it is good - as "to J. Staff of Litchfield County", "the Eldest Son of J. S." "Parson of the Parish", &c. are all good -

Where a man devised to "his relations" &

be restrained the words & gave the prop^y to such as wd. take under y^e Stat. of Distributions. So also they have rights words, as where the test^r devis^d to his "poorest relations." 1 Ves 84. 1 Ath. 75 y. 761.

Words are to receive their technical import if not contrary to the evident intention. The word heir is to be understood as a word of limitation. But it may be understood as a word of purchase, if it is apparent from circumstances he used the word inaptly. Thus where the test^r had a nephew & 2 daughters, & he gave to "my male heir," &c. now he had no male heir. but the Ct. to give effect to y^e devise understood it as a word of purchase, & allowed the nephew to take. So if the devise is to the "heir of J. S." (J. S. living) & at the time of the devise he had a son. the words used will be construed a word of purchase, to mean that son. therefore if J. S. leaves his great uncle his heir, that person will not take. 1 Sw. 203. 1 Vent 334. 372. 2 Ib. 311. Rob. R. 34.

The construction of the word heirs is still unsettled, & it promises to give rise to much contention & litigation

Of Executory Devises & Remainders.

To understand what it is which constitutes an Exy Devise we must take into view the nature of Remainders. I have mentioned the differ.ce between the construction of Deeds & Wills, & that the latter cannot create an Estate unknown to the Law.

The intention of the testr is to be regarded if not contrary to the rules of Law, the technical words are not usd. The case of Exy Devises seems to be a departure from the principle, because by Law you cant create an Estate to commence in future without a particular Estate to support it. Here then is a solitary exception.

It is a rule, that if what is given in a will, were given in a Deed it would create a Rem.r it is a remainder. Remainders & Exy Devises agree in this, that they are Estates to commence hereafter & Rem.rs cant be by Deed but Exy Devises by wills only, but a Rem.r may also be creatd by will.

There are cases where the Estate will pass if first by will when if such were usd in a Deed it would be bad. It may be creatd by Deed given an Estate to commence 20 years hence, but be cannot by Devise. Every conveyce in a will which is good in a Deed is a Rem.r, if not good in a Deed it cd be an Exy Devr that it may not be good Exy Devr.

Devises.

Lect. 12th

An Estate in remainder is subject to technical rules & the intention of the grantor must yield to the superior force of these. But in any Devise the intention is consulted & carried into effect.

It is necessary in creating a rem.r that there be a particular Estate to support it. For the different kinds of these see "Estate in possession rem.r &c." — Where the subject is treated at length, & all the rules applicable to the subject are there laid down.

A fee simple cannot be limited upon a fee simple in a Deed. but in a will it may in the latter case it is an Exy. Devise. because it is not good in a Deed.

So neither can an Estate be made to commence in future in a Deed but in a Devise it may. (B

Again. By Deed no man can create a rem.r in an Estate for life (because an Estate for life is greater than an Estate for years. but in a Devise this may be done. These are the three cases of Exy devises

A "Rem.r is an Estate to be enjoyed after the determination of the particular Estate. there is no contingency on which it depends. Where an Estate is greater than one for years livery of seisin is necessary. In this Country delivery of the Deed is equivalent of it. for a rem.r cannot be created without livery.

Devises.

The Rem^r. must be creatd at the same time as that the particular Estate is creatd tho' it need not vest in rem^r. man at that instant.

A rem^r. may also be limitd upon an uncertain person as well as upon an uncertain thing. Therefore a rem^r. to the heirs of A. is good. But it must be limitd upon a person in esse within a common possibility of coming to the enjoyment of it. Again if the particular Estate on which a contingent rem^r. is dependant, is lost the rem^r. is also gone. as if the particular Estate is an Estate forfeit a surrender &c his Estate.

Suppose an Estate is given to A for life rem^r. over to B. to preserve contingt. rem^r. the rem^r. to C. what is meant by preserving contingent Rem^r.? It is that if A. looses his particular Estate the rem^r. is vested in B. & not lost as it wd. be, if made otherwise. B. is called the trustee to support the contingent Rem^r. & his office as trustee continues during the life of A. Devises. Of Ex^y. Devises. This is an Estate created by will to be enjoyed in future & must be such an Estate as cannot be a remainder.

No particular estate need be made to support it as if it be a fee to A to commence the day of his or her marriage. good. This sort of Estate it was built up by the Cts. & no Statute was ever made allowing it. nor was it known to the Law.

2 Bac. 176.

Devises.

Another diffce is that [illegible] may be limited after a fee by way of Devise, a rem. cannot. But here it is necessary that the contingency on which the Devise depends must be within a certain limit & be possible of happening - else a perpetuity will be created. The length of time was determined to be during a life or lives in being & 21 years & a fraction of a year afterwards. If it goes beyond this the devise is void. Originally the rem. man must have been in being but the period was extended, & the person allowed to take the 21 years &c after the time elapsed before & time. And this is now the Established rule. 2 Bl. 173

Again an Exec. Dev. for life may be created in a term for years by Will, tho it cannot by Deed. As if A has an Estate in Bl. acre for 1000 years, now an Exec. Devise may be created in B. for life with rem. over to C. for life &c & all that is requisite is that all the rem. men be in being at the time it is created - But in such case the life Estate in B. &c would be void if created by Deed, because the life Estate is a Free Hold considered of a higher species than one for years. 2 Bl. 178.

In some of the United States Statutes have been made regulating this thing - In C. the Statute plans Exec. Devises & Rem. on the same footing - this provision I believe to be peculiar to our State. The words of our Stat. are "all kinds of Estates" may be made either in a Will or Deed &c. any

person in esse & to their immediate descendant to commence in future when they shall be able to take - as when the immediate issue come into being.

Suppose an Est.e is given to "J.S. & if he dies without issue, rem.r over to T.N." This is not good - for by dying without issue is meant the failure of his issue 1000 years hence - thus if his issue shd. ever fail, it was decided was within the meaning of the words. & therefore a rem.r limited on this contingency was not good, being too remote - There are numerous authorities to this doctrine, tho it is contrary to common sense, as This doctrine is. Fearne ___ But if such words were used in a devise & J.S. died without issue it would have taken effect - The feelings of men revolted at this decision, & Cts. are constantly searching for circumstances to take y.r case out of the rule. - 10 Mod 420. leading case. Cro J. 590. 1 Salk 226. Cro. E. 878. - Cases exemplifying y.r nature of rem.rs & Exg. Dev.s

1st. A. devises an Est.e to B. his wife for life, rem.r over to C. - good rem.r vested.

2d. A devises to B. his wife for life, rem.r to y.e heirs of his eldest son - his son then having no heirs - now this is a good Exting.g rem.r & no Exg dev.e for it has the properties of a rem.r

3d. A devises an Est.e to B. for life, rem.r to the heirs male to C & his heirs forever but if my son B. pays to my son C. £1000 within 2 yrs. after his mothers death then to D. & his heirs. This will be a good Exg devise

fee in fee is limited after a fee. (10 Mod 8 supra).

4th. This case is a leading one. A. devises to B. & his heirs forever. But if B. dies without issue living A. then to C. & his heirs forever. Cro J. 590. - This was an Exry. devise. -

5th. A devises to the heirs of C.D. at 95. death - Exry. devise. 1 Sal. 226. Cro E. 878.

One word with respect to the distinction between a contingent & vested remr. - A remr is contingent because it may never vest. for a remr. vested in interest may never vest in poss. Adistinction may be drawn in this way:- If there is a capacity in the remr. person, (i.e. if he is in esse) to take at the time of the creation of the remr, it will be a vested remr. - But if he is not in esse, he will not have capacity to take & therefore it will be a contingent remr. (a)

(a) This distinction answers only where the person is uncertain, does it? N.F.)

Fearne

Of Title by Deed.

From Mr. G.'s notes.

"Purchase" includes every mode of acquiring an estate, except that of descent. 2 BC. 241. 244.

Introductory Remarks. The most usual mode of acquiring title to Real Estate, is that of alienation or purchase in the limited sense of the word. 2 BC 287.

The word "alienation" comprehends every mode of conveying title, by which estates are voluntarily resigned by one, and accepted by another. i.e. every mode of transmitting property, by the mutual consent of the parties. 2 BC. 287.

During the early period of the feudal law, tenant of lands could not alienate, without consent of the Lord, nor could he be subject them for his debts nor devise them, nor with Lords consent could he alienate, without consent of his heir apparent, or presumptive. 2 BC. 287 & 57. Cod. 94. 4 Cruise 4.

Nor could the Lord alienate his seigniory without consent of his tenants, which was called attorning. Hence the doctrine of attornment. (2 BC. 288.) which was afterwards extended to all leases for life or years. &c.

Indeed during the time of the Conqueror & his sons, land was absolutely unalienable neither could nor Lord alienate it. 4 Cruise 36. Wright's Ten. 54

And for some time after the right of alienation was introduced the highest estate that could be granted

was an Estate for the life of y^e grantee. 2 Bl. 55. 128.

But these feudal restrictions have been gradually abolished:

In the reign of Hen. 1. a man was allowed to aliene, in fee, a part of the land which he had purchased—but not the whole so as totally to disinherit his children 2 Bl. 288. 289. 4 Cruise 5.

But he was not permitted, at that time, thus to aliene his ancestral Estate, derived by descent. 2 Bl. 289.

Afterwards he was allowed to dispose of all his purchased estate, if he had purchased to himself & his assigns (by words not.) & 1/4th of his ancestral estate without his heirs consent. 2 Bl. 289.

But by the Stat. of Quia Emptores, 18 Edw. 1. all persons, except the kings tenants in capite, were empowered to aliene all their lands. 2 Bl. 289. 4 Cruise 6.

The land aliened by a tenant (under this Stat.) was not however to be holden of him, but of the next immediate lord. 4 Cruise 6. 7. 2 Bl. 289.

By Stat. 1 Edw. 3. the kings tenants in Capite were also permitted to aliene on paying a fine. And by Stat. 12 Car. 2^d. the fines, required by the last Stat. were abolished in the case of freehold tenures. 2 Bl. 289. 4 Cruise 8.

By this last Stat. the military tenures in Eng^d were all abolished & all the ancient freehold tenures were converted into free & common socage. 4 Cruise 9. 15. 2 Bl. 299. [illegible]

The power of charging lands with the debts of the owner was introduced by Stat. West. 2^d. 13 Edw. 1. which subjected half of his lands to execution. 2 Bl. 289. 161. [illegible]

elegit, under which the Creditor holds till the rents & profits satisfy the debt.

This power was unknown by C.L. 2 Bl. 287. 3 H. 418.

By the St. de mercatoribus (13 Edw. I. he was enabled to pledge all his lands, by a Stat. Merchant. & by a St. staple, by Stat. 27. Edw. 3., & by other recognizances by St. 23. Hen. 8. 2 Bl. 160. 285, 290. 4 H. 420. 428.

The necessity of attornment was abolished by Stat. 4 & 5 Ann. 2 Bl. C. 290.

Nature of Deeds.

The legal evidences of the alienation of real property are called, in the Law, common assurances, being the means by which a man's estate is assured to him. 2 Bl. 294. 1 Cruise. 9.

These assurances are of four kinds: 1st Deeds or matters in pais. 2d Matters of record i.e. judicial assurances, made in a Ct. of record. 3d Assurances founded on Special Custom. 4th Devises. 2 Bl. 294. 1 Cruise 9

For alienation by matter of record & by special custom, &c. 2 Bl. C. 344. 365. of these I shall not treat.

A deed is a writing, sealed & delivered. Co Lit. 171. 2 Bl. 295. Co Lit 35. 1 Cruise 10.

Writing & sealing constitute the instrument, but it does not take effect till delivery. Lee is sealing & signing in Com. 1 Sw. 300. post

The making of a deed is the most solemn act that a man can perform in the disposition of his property. Hence the rule. That every one is estopped by his own deed. 2 Bl. 295. 1 Com. Dig. 434.

Of Title by Deed.

The meaning of the rule is, that no man shall be permitted to aver or prove any thing in contradiction of his deed. 2 Bl. 295. 3 Th. 308.

Thus if A makes a Lease to B of lands in which he has no interest, & afterwards purchases the lands, he is estopped by his covenants to deny that he had title at the time of making the lease. Vid. 290. Com. Al. 495. 5. 3 T.R. 438. 441. 2 Lil. 364. 1 L. Ray. 729. 2 H. 1048. 1550. 6 Mod 258. 3 T.R. 371. Esp. 233. 306. 1 Bou. L. 100. Co. Lit. 265. Gilb. § 446 "contends". 1 Rol. 222. 2 T.R. 171. Cowp. 597. 1 T.R. 760. n.

But if matter of estoppel instead of being pleaded as such, is relied upon merely as evidence, it is not conclusive, tho' good evidence. 3 East 346. 365.

(Is ye principle that ye estoppel is waived, unless insisted upon, as such?)

But a Quit-claim deed is no estoppel (semb.) for grantor does not covenant that he has title. 3 T.R. 370. Co. Lit. 265. Gilb. § 446.

Mortgor cannot in ejectment deny mortgee's title. Same rule between lessor & lessee. 1 T.R. 760 n. 1 Mod. 77.

If a Lease is made by Indenture, lessee cannot, in debt or covenant for rent, deny lessor's title — the indenture being the deed of both parties. Aliter if the lease had been by deed-poll. Lit. § 58. Co. Lit. 47. 3 Lev. 146. Esp. D. 233. 306. 1 Mod. 53. 1 T.R. 760. n. Ruled in Com. that a lessee by deed poll, semble, cannot in ejectment deny lessor's title. 1 Mod. 77. 1 T.R. 760 n.

A deed executed by one of the contracting parties only, is called a Deed-poll, a single deed. If executed by all ye parties to it it is called an indenture. 2 Bl. 295. 6. Co. Lit. 229 n. 1. Gilb. § 37. 2. 37. 4 Cruise 11. 12.

Title by Deed.

If the parts of an indenture are interchangeably executed, (i.e. each part by one party only) that, which is executed by the grantor is called the original, & the others counterparts. But each part is usually executed by all - in which case all the parts are originals. 2 Bl. 296. 4 Cruise 12.

A counterpart alone has been holden, in Eq. & at Law, sufficient evidence of the existence of a deed to convey. decided according to 4 Cruise 12. Sir Ed. 118. 3 Atk. 465.

For the distinction at Law, see Parker 96 & 3 Atk. 465. Doe 237

Requisites.

1. Parties. The first requisite to a deed is that there be Parties able to contract for the purpose intended & a thing or subject matter to be contracted for: Hence in every grant, there must be a grantor, a grantee, & a thing granted. Litt. 2 96. Co L. 35. 4 Cruise 13. 14.

Parties.

If the whole interest in any subject is to be granted all those who have any right or interest in it, should join - Deeds, their int. will remain in them. 4 Cruise 13. 14. Co Litt. 76.

So all those intended to take any immediate interest (or rather any other interest than a rev. or rem.) under the Deed, ought to be parties. for those who are not parties cannot take an immediate interest at Law. 4 Cruise 16. 4 Co. L. 231. Hob. 313.

But one may take an estate in rem or rev. by a Deed to which he is not a party. 4 Cruise 14. Co. L. 231.

Who may convey by Deed & what. General rule: All persons under no legal disabilities may convey by Deed. 2 Bl. 295. 4 Cruise 14.

Infancy. But a person under 21 yrs, tho having the

right of poss.ⁿ cannot convey to another who is also out of poss.ⁿ 2 Bl. 290. Co. L. 214. 390.

This rule is intended to prevent the sale of pretended titles, & to discourage maintenance. Co. L. 214. 2 Bl. 290.

In Con. conveyances in such cases, are prohibited by stat. The conveyance is declared "null & void," & the party making or receiving the conveyance forfeits one half of the value of y. land, to be divided between y. State & the person prosecuting. St. 446. 1 Root 100. 199. 402. Kirb. 221.

But a conveyance by y. owner out of poss.ⁿ to the person in poss.ⁿ is not within the Stat. or the C. L. prohibition. 1 Sw. 300. St. 444.

But the owner is not deprived of his right to convey by the poss.ⁿ of another, unless that poss.ⁿ is adverse to y. owners title. He must be "disseised or ousted" as our Stat. expresses it. St. 444. 1 Sw. 300.

Hence reversions & vested remainders may be granted tho the land is in y. poss.ⁿ of the particular tenant: his poss.ⁿ being that of the rem.ʳ man or reversioner. 2 Bl. 290. 1 Sw. 300.

So, whenever one is in poss.ⁿ of anothers land, but claiming under y. owner, y. latter may convey to a 3.ᵈ person. 1 Sw. 300.

It has been decided in Con. that y. Stat. making void sales by disseisees to persons out of poss.ⁿ does not extend to sales made by the State. Kirb. 221. Root 439. Not within y. mischief.

Nor to sales by an Ex.ʳ or Adm.ʳ under an order of probate. 1 Root 489. St. 100 cont. He is bound by law to sell & acts in obedience to the sentence of a ct. It is not he cannot be said to be disseised. He is not y. owner.

Same rule of Guardians, who sell their wards land, in pursuance of a decree of Chy. 1 Root. 491.

So of collectors of taxes, who sell for taxes. it is by order of Law. 1 Root. 491. vid. Stat. C. 569. 570. See 1 Sw. 300. that if A sells to B. & continues in possn & then he sells to C. the last sale is good because A cannot claim vs his own warranty. Qu.

Mortgee whose title is denied by mortgee & who is out of possn. may convey his interest. (Sanford v. Washburn. C. J. & 2 Root. 499. in Sup. Ct. contra.) Morton being in of power of mortgee.

Infants. As to conveyances by Infants see "Parent. & Child." Their conveyances are generally voidable only & not absolutely void. 2 Bl. 291. 4 Cruise 15 &c.

Idiots. Idiots & Lunatics are not totally disabled to convey their Land by deed: for by the C. L. neither an idiot nor lunatic can avoid his own deed; cannot stultify himself. 2 Bl. 291. Sha 1104. Cro E. 398. 4 Cruise 20. Litt § 405. 4 Co 123. Jenk. 40. 1 Fonbl. 40. 1 Ld Co Lit. 247 a. b. "Because he cannot know what he did" while insane. 1 Fitz. N. B. 202 contra. Comb. 469. Sha 1104.

But the King on behalf of an infant idiot, may avoid his deed during the latters life. 2 Bl. 291. 1 H. 303. 4. Co L. 2. The objection does not apply in this case. The committee of a lunatic may do the same. Fonbl 43. 4. 2 Vern. 412. 678. 1 Eq. C. ab. 279. 1 Ch. Ca. 112. 1 Bl. 305. 6.

And after the death of the idiot the his heir, or (as the case may be) his Admr may avoid his deed. So also may the heir of the Lunatic. (But an idiot cannot have an heir. 1 Fonbl 43.) Bl. 292. Perk. § 21. 4 Cruise 20. But

'ceives in estate cannot do it. e.g. Remainder man. 4 Co. 124. 8 H. 43ª. 1 Fonbl. 45.6. Ex. Idiot being tenant for life, with power to make a jointure makes one & dies. remainder man cannot avoid it.

Note. The mere execution of a deed, by an idiot or lunatic, is absolutely void as to his heir. but if he makes a feoffment & delivers seisin, in person, it is only voidable. 4 Cruise 20.10.6. 8 Co. 42. 4 H. 125ª. Litt. § 406. 1 Fonbl. 44.5.

But if an Idiot &c levies a fine or suffers a recovery, it binds his Representatives, as well as himself. They cannot contravert. ꝑ record. 4 Co. 124. 12 H. 123.4. Co. L. 247. 6 Cro. E. 187. Perk. § 24.

Qu. as to rule, that an idiot &c cannot avoid his own deed in Conn. Our Sup. Ct. once decided that he might avoid his lunacy to a sale of personal prop[erty]. Decided [illegible] by that he may. 3 Day 90.

If a non compos purchases an estate, he may on recovering his understanding assent to it, & thus make it unavoidable even by his heir. Co. L. 2. 2 Bl. 292.

But if he dies without recovering his understanding or having recovered it, without assenting to y^e purchase. his heir may avoid it. Co. L. 2. 2 Bl. 292.

Femes Covert. As to the conveyance & purchases of Femes Covert see Hus. & Wife. 2 Bl. 292.3. 4 Cruise 20.[illegible]

Duress. If one makes a deed in consequence of duress he may affirm or avoid it, when the duress is removed, 2 Bl. 292. 5 Co. 119. So if one purchases under duress. 2 Bl. [illegible]

If a deed is made by several some of whom are legally capable of conveying & others not, it will operate as the deed of

kes

those only, who are capable. Shep. T. 81. 2. 4 Cruise. 427) ex. if one only has all y. interest in the subject. So e converso if one only of the grantees is capable of taking it shall inure to him only. Touch. 71. ex. grant to J. S. & a monk. Perk. § 66. 4 T. R. 472. 1 Bl. 619.

Who, may be Grantees. By the C. L. all persons may be Grantees in a deed. as femes covert, infants idiots, lunatics, as well as persons of sane mind. 4 Cruise 22. Co. L. 2. 3. n. 1. Ma. Supposed to be for their Benefit. But in the cases of femes covert, infants idiots & lunatics the purchases are voidable. See "Husb. & wife" "Parent & Ch." "Contracts". 4 Cruise 22.

So an alien may at C. L. purchase by Deed. But he cannot hold y. land for on office found it goes to the King. 4 Cruise 22. Co. L. 2. b. Esp. D. 434. 4 T. R. 300. See "Plead.g Dilatory".

An alien friend however may hold a lease for years of a house, for the convenience of merchandize. 2 Bl. 293. "Ejectment" p.

In Con. aliens are by Stat. disabled to hold or purchase land without special license from y. Legislature. St. C. 358. 1 Sw. 299.

Exception in favor of British subjects, who owned land here, before the late war, & securing to French subjects, the rights to which they are entitled under our treaty of amity with y. French King, Louis 16. Stat. 358.

Special Licenses are usually granted, when applied for.

Those who are naturalized under the laws of y. U. S. are not within the prohibition, I conclude.

By certain early Stats. alienation in mortmain, &c

to any ecclesiastical or other Corporation, are in some cases, prohibited; & in others much restrained. 2 Bl. 256 &c. 1 H. 479. 4 Cruise 23.

No such Stats. in Cont. Here Ecclesiastical & many other Corpo. may purchase lands.

But we have a Stat. enacting that all lands &c granted for the support of y. gospel ministry, or of schools or for the relief of the poor, or for any other public and charitable use, shall forever remain to the uses to which &c. thus making them unalienable. St. C. 433.

This St. has been evaded by very long leases for a sum in gross, & our Cts. have sanctioned y. evasion.

Consideration.

IIId. A deed must be founded on lawful & suff. consideration. 2 Bl. 296. 4 Cruise 24.

Said not to be necessary at C. L. (i.e. before the doctrine of uses, I suppose,) that any consid. sh. be expressed in the deed, (4 Cruise 24. Plow. 308.) for y. deed implies one.

But under the Law of uses a deed witht. consid. is said to enure to the use of y. grantor, (i.e. y. beneficial int. for the legal estate w. pass to y. grantee, 2 Bl. 136. 271. 2. 307. & 330. (Rob. Frauds Conv. 85.) unless expressly declared to be to y. use of another. 2 Bl. 330.

And now since y. Stat. of uses (27 Hen. 8.) has executed y. uses, (2 B. 332-3) i.e. transferred y. legal estate to y. cestuy que use, a deed without consid. is said to enure to y. use of grantor at law. 2 Bl. 290. Pick. § 533. 1 Ash. 37. Prid. 4 Cruis. 101. Willes 263. n. 2 assignment of leases.

But a consideration either good or valuable, is

is sufficient to raise a use. 2 Bl. 330. Mo. 684. 4 Cruise 24. 2 Bl. 335. post

But Qu. whether the rule, that a deed without consid.n enures to the use of grantor applies to any other deed than that of bargain & sale. — 2 Bl. 296. Ch. notes Shep. T. 221. 1 Co. 170. a. b. 1 Chit. Bl. 351. Rob. Fr. Con. 85. That deed hav.g its operation by Stat. of uses — & having never founded on any other than a valuable consid.n 2 Bl. 327. 338. Cro. J. 696.

And in Eng.d a deed, declaring no use, enures to the grantor, being &c.

But Qu. whether the rule that a deed witht. consid.n enures to y.e use of y.e grantor, can apply in this State — since y.e doctrine of uses was never received here — nor has the practice of conveying to uses ever obtained here. Swift. ante.

Considerations are either good or valuable — A good consid.n is that of kindred or natural affection towards a near relation, as a child, parent, brother, sister, nephew, niece, or heir at Law. (4 Cruise 25. 2 P. W. 59. Rob. Fr. Conv. 129.) Valuable is one in which there is pecuniary value. 2 Bl. 297. 444. 4 Cruise 24. 5. 3 Co. 39.b 83. 1 Pow. C. 361. 1 Fonbl. 337. (Contracts.)

Marriage is always deemed a valuable consid.n. 4 Cruise 24. 2 Bl. 297. "Fraud.t Conveyg."

A consid.n good or valuable will support a deed of Conveyance. 2 Bl. 297.

But a conveyg.e on good consid.n only is as to y.e creditors of grantor & bona fide purchaser, fraud.t & void. 2 Bl. 297. 9 East. 59. (Post Fraud.t Conveyg.e)

The consid.n express.d in a deed cannot be denied by grantor or his heirs for y.e purpose of defeating y.e title — they are estopped by y.e deed. "Cont.s" 1 Pow. C. 348. 2 Bl. 295. Cow. 434. 7 Co. 40. 1 Root 479.

But

Title by Deed.

But they may impeach it, for illegality as usury &c. 2 Bl. 296. 2 Vent 109. 2 Wils 344. ("Contracts" p.)

And strangers (as creditors of grantor, & purchasers bona fide) may deny ye existence of it. ("Fraudt Conveyces")

A deed expressed to be for "divers good considns" is considd as expressing no considn - for the Ct. cannot from this description, judge of the sufficiency of ye real considn 1 Co 176. Hob. 151. 2 Roll. 783, 786. 2 Co 15a Cro E. 394.

But in such a case the grantee may aver and prove the actual considn - as money hundred &c. for this does not contradict the deed. 1 Co 176.a 2 Ib 76. 7 Ib. 39. [40a] 2 Rol. 786. 5 Co 26. a. b. 4 Cruise 38.

So where for the considn expressed of £ 70 recd of A. lands were limited to A for years, remainder to B & C &c. - an averment was admitted that ye deed was given, as well in considn of a marriage between B & C as of the £ 70. &c. - 1 Co 176a 7 Co 39a [40a] 2 Ib. 76. vid. 4 Cruise 38.

Hence it seems that if ye deed makes no mention of a considn, the true considn may be proved by parol, as money paid, blood &c. 2 Co 76a

If it appears in a deed, expressing no considn yt the conveyce is to grantor's wife child or other near relation the deed imports a sufft considn from ye relation in which the parties stand. No averment of considn is necessary. 7 Co 39b [40a] Plow. 304a Rol. A 58. ex Covt to stand seised.

But in such case, if a specific considn is expressed no other can be implied on ye face of ye deed. ex. Covt to stand seised in considn of £ 100. pd by my son &c. Here ye considn of natural affection is not implied "expressum facit, cessare tacitum". 7 Co 39b Co. L. 183b 3 Ib. 54a -

Title by Deed.

Acknowledgment in a Deed of the receipt of the consid.n is not conclusive on the grantor. only presumptive evidence - may join, to secure the title, & prevent a resulting use. 1 Root 479. Brace v. Tallon S.C. 2 Root 99.

Of Writing &c.

IIId. Every deed must be written on printed, on paper or parchment. 2 Bl. 297. 4 Cruise 25. Co. L. 229a.

But it may be in any language or character. Idem.

Formerly writing was not necessary for the conveyance of Lands. 2 Bl. 310. 313. But now by 9. Stat frauds &c. (29 Car 2) no interest in Lands for a longer term than 3 years, can be created without writing. And any lease or grant, for a longer term not written, operates only as a lease at will. 2 Bl. 297. 306. Rob on Fr. 240. 1 Bac 72. Now as a tenancy from year to year. (See "Estates at will")

The deed must be written, before the sealing and delivery, for if one seals & delivers a blank paper with directions for filling it up, it will not be his deed. It takes effect from delivery, & as delivered. 4 Cruise 25. Shep. L. 54. Cook 118. (See "Bills & Exch.s")

IV. The subject matter must be legally set forth tho it is not indispensable that the different parts sh.d be in the order usually prescribed. 2 Bl. 298. Co. Lit. 225. H. 6. 4 Cruise 32. 3.

The four usual & orderly parts are eight, viz.

1st. The Premises. containing the names & the parties & their additions the necessary recitals, if any, the consideration, the description of the thing granted, usually by metes & bounds quantity &c. (See, Post [ ]) and the

exceptions, if any. i.e. all that precedes the Habendum. 2 Bl. 298. 4 Cruise 33.

And the omission of grantees name in the premises does not vitiate the deed, if the name is in the habendum. And in such case a wrong name in the former may be rejected as surplusage. 3 East 415. Co. Ent. Shipl. T. 75. Allen 41. 4 Cruise 419.

So where the name of the bargainee grantee was omitted in the recitative part of the grant, but the consid^n was expressed to have been paid to him, deed was holden good by evidence that the consid^n was paid to the S^d A, both bargainee &c. 4 Cruise 419. Sal 341. 10. Mod 40.

And if the grant is to George, "Earl of A," or "Bishop of B." who his name is John, the grant will be good no danger from uncertainty as only one person can have such a dignity. 4 Cruise 34. Co. L. 3a.

And in general a mere clerical mistake will not destroy a deed. It may be explained by mistake of figure in the recital. 4 T. R. 165. ante p. 4 Cruis. 419. Sal 341. 10. Mod 40.

"The wife of A" without her christian name, is a sufficient description of the grantee. So of a wrong christian name is rejected for what per inutile &c. 4 Cruise 35. Co. L. 3a.

But in ordinary cases a grant by christian name & surname only is void, for uncertainty. 4 Cruise 35. Co. L. 3a.

A name acquired by reputation or habitual designation of a person is sufficiently described by the name of which he is usually known. 4 Cruis. 35. Co. L. 3a.

So a party may be described without either of his names. Ex. Grant to "the first son of J. S." 4 Cruise 30. Co. L. supr.

So, the word "issue" is a good description. Ex. grant to "the issue of A" that term being equivalent to "a child" or "children". 4 Cruise 35. Co. L. 28ᵃ.

For the rules as to exceptions in deeds, see 4 Cruise 40. Shep. T. 77. Cruise 6.

2ᵈ & 3ᵈ The habendum & tenendum. — The office of the "habendum" is to designate the quantity of interest conveyed, tho' this may be done in the premises. Ex. grant of black acre to A to hold to him & his heirs; or grant of Bl. acre to A. & his heirs. 2 Bl. 298. 4 Cruise 40. 7 Rep. 302.

When the quantity of interest is expressed in the premises, it may be restrained, enlarged, explained or qualified in the habendum. Ex. grant to A. & the heirs of his body, habendum to his heirs forever. A. has an estate tail, with a fee simple expectant. "Estates in Poss." 2 Bl. 298. Co. L. 21. 2 Roll. R. 19. 23. Cro. J. 470.

The rule is said to be the same if the grant were to A. & his heirs forever, habendum to him & the heirs of his body. 2 Bl. 298. Cro. J. 476. 2 Roll R. 19. 23. But see 8 Co. 154ᵇ. Co. L. 21. n. 2. 183. & 299ᵃ. Moore 26. 4 Cruise 154. contra, i.e. that A takes a fee tail only & not a fee simple expectant. Sed qu.

General rule, that generality of expression in descriptive part may be restrained by the habendum. &c.

But the habendum, if totally repugnant or contradictory to the premises is void; for in deeds if two clauses are inconsistent, the first must govern. 2 Bl. 298.

1 Sw. 302. Co L. 299. Shep T. 88. Hard 94. Ven 30. Ex. grant to A & his heirs, habendum to him for life. the habendum is void. for the inheritance is before conveyed, & cannot be thus devested. 2 Bl. 298. 2 Co 23. 8 H. 55. 4 Cruise 433. Plow. 153. — For other rules as to operation of the habendum see 4 Cruis. 431.7.

The Tenendum was formerly used to express the tenure by which the estate was to be holden. Now of no use — all feudal tenures being converted into free & common socage by Stat. 29 Car. 2. 2 Bl. 299. 4 Cruise 9.47.

4th. The Reddendum expressing the terms (if any) on which the grant is made. Ex. Reserving the yearly sum of 5£. &c. 2 Bl. 299. 1 Plow. 13. 86 71. 4 Cruise 47.8. Inf. p. 250.

5th. The Condition (if any 2 Bl. 299.) for which see "Estates on Condition" p.

6th. The Warranty by which the grantor, for himself & his heirs, warrants the estate to y^e grantee. 2 Bl. 300. 4 Cru. 49.

In this case if the grantee is evicted the grantor is bound to give him other lands of equal value — and this he may be obliged to do, either upon voucher by grantee, or by writ of warrantia chartæ. 4 Cruise 49.54. 2 Bl. 300 & Litt 365. a.

As to warranty lineal & collateral. see for the difference 2 Bl. 303. Litt § 143. Co Lit. 174. 384. 1601.

Warranty may be express or implied. 4 Cruise 49. 50. Co L. 384. a. 2 Bl. 300. 1 Sw. 305.

In modern practice warranties are disused, being superseded by Covenants. 2 Bl. 304. Bac. Cov. C. 4 Dis. 11.

7th. The Covenants which are agreements, by which either

either of the parties stipulates something in favor of the other, e.g. that grantor has right to convey that grantee shall quietly enjoy - that grantee will pay rent, or repair &c 2 Bl. 304. 4 Cruise 64. 1 Cov. 138.

The usual covenants in conv. conveyances (except Quitclaim) are two - 1. That grantor is well seised & has good right to convey - 2. To warrant & defend the title vs all claims - 1 Rich. 1. 2 Mac. 80. Ord. -

The principal difference, in effect, between a warranty & covenant is, that the former binds the grantor as the case may be, his heir 2 Bl. 304.) to assure other, land in case of eviction, but does not bind his ex & adm: 2 Bl. 304. 4 Cruise 49. 50. 86. 1 Cov. 511. Jac. ab. Cov. 4 Johns 11.

A covenant, on the other hand, entitles grantee to a recompense or damages only, & always binds the grantor but not the heir, unless named. 2 Bl. 304. & 2nd notes. Co Lit 378. a 4 Cruise 50. 86. 1 Cov. 511. Jac. ab. Cov. C.

As to the different kinds of covenants in convey ces & their nature & effects, see "Action of Covenant broken."

If the land conveyed, is described by metes & bounds & answers that description, grantee is not liable on his covenants tho it falls short of the quantity mentioned in the deed - 1 Root. 528. 2 Mo. 252. 2 Mass. R. 381. 1 Ja. 300. Ex. Blackacre bounded &c containing 100 acres - The description by metes &c governs - unless there is a special covenant as to the quantity. Same rule, if the deed refers for description, to another deed, or to a record containing a description, like the above. 2 Root 252.

When the metes, i.e. distances or length of lines do not

not correspond with the bounds or monuments, the latter govern. Ex running 100 rods to such a monument, if the distance proves to be greater or less—Ruled several times by the Ct.

Qu. would action for fraud lie in these cases if grantor had intentionally deceived grantee? Would it not be an answer to the action, that grantee might have insisted on a covenant in the deed, as to the quantity. 2 Day. 128.

But if the description is by quantity, without metes or bounds, the grantor is liable in case of deficiency—semb. Ex. grant of one hundred acres called Black-acre—1 Sw. 305.

Secus, it is said, if the description in the last case, is qualified by y. words "more or less"; the quantity is then supposed to be inserted by way of estimation. 1 Sw. 305.

But where y. description is by metes & bounds the words "more or less" have no operation, semb. the description by metes & bounds govern.—ante.—

8th Conclusion which mentions the execution & date. 2 BC. 304. 4 Cruise. 99. The date may come in, either by insertion in the conclusion, or by reference to a day before mentioned.

The date is in strictness no part of the deed itself but merely a memorandum of the time of its execution. And formerly deeds were not dated. Dates became customary in the time of Edw. 2d. or 3d. 4 Cruise 33. Co. Lit 6. Gilb. Bills 43. 4 id. R. 337. Yelv. 193. 2 BC. 304. Ch. notes.—

But a date is not now necessary. 2 BC. 304. 4 Cruise 99. And when inserted it is only prima facie evidence of the time of execution. Shep. T. 72. 2 Co. 4, 5. Thus if there is any

impossible date, a wrong one, or none at all the time of execution may be proved by Parol. 2 Bl. 304. 6 Co. 36. Dy. 28. Sal. 462. 3. 4 Cruise 34.

If two deeds be one date, & manifestly contain but one agreement, that which best supports the clear intention of the parties shall be presumed to have been first executed. 4 Cruise 34. 1 Bur. 106. 7.

V^th The next requisite to a Deed is the reading of it.

This is necessary, if either party desires it. If not done it is as to him void. 2 Bl. 304. 4 Cruise 27. Moore 184. Sheph 70.1

If he is able to read, he should read it himself. If not another sh^d read it to him. 2 Bl. 304. 1 Sw. 306. 2 Co. 3. 9. 4 Cruise 27. 11 Co. 27. Ex. If he is blind, or unable to read, or if deed is in language unknown to him. But if he does not request that it may be read, he is bound by it. 2 Co. 9^b Moore 184.

And if it is read falsely, it will be void, (at least as to the part falsely read) unless it is so read by collusion between him & y^e reader, or purpose to defeat it - in which case, it will bind the fraudulent party. 2 Bl. 304. 4 Cruise 27. 2 Co 9^b 1 Sw. 306. Shepk 70.1.

When a deed being void in part, is so in toto, & when not, see Shepk. 70.1. 11 Co. 27. 8. Dy. 27.

VI^th Sealing is necessary to a deed, at C. L. & by the Stat. of Frauds &c signing also in most cases. 2 Bl. 305. 6. 2 Wils 26. 4 Cruise 27. Shepk. 60. 57n - In sealing only is Com^n Law. 307.

Signing was not necessary at C. L. & consequently not in use. 2 Bl. 305. 6. Shepk. 57. 60. Com. Dig. "Fait" B 1. origin of sealing 2 Bl. 305. 5.

In Com. Signing is necessary not only by the Stat. of Frauds, but by a distinct Stat relating to conveyances of Lands. St. C. 643. post

One may appoint another his attorney to execute a deed for him; but in such case it must be executed in the name of the principal. Stra. 705. 4 Cruise 28. 10 Co. 33. 507. Moore 71. 9 Co. 76. 2 Lev. 1415. 0 S.R. 177. 3 Bac. 408. Ex. A. by B. his atty.

But no particular form is necessary. 2 East. 142.

If the atty. executes the deed otherwise than in the name of his principal, he binds himself. Co. Lit. 13. 24. 2. 56. 70. Stra. 705. 955. 10 C. 181. 2 Esp. 75.

But an atty. or agent cannot bind his principal, nor one partner his copartner by deed without authority given by deed. Contra, Co. Lit. 52. 7 T.R. 207. Com. Di. Atty. C. 15. 3 Bac. 403. 4 T.R. 313.

This rule however seems to contemplate an execution of the deed in the principal's absence, for it has been determined, that if one executes a deed for himself & another in the presence & by the direction of the latter, it will bind both. (4 T.R. 313. Abbot. 218. 1 Liv. 304.) Hence a person physically incapable of affixing a seal, &c. may be bound by a deed.

If several are named as grantors & one only seals it is his sole deed. Shep. T. 56. 23.

VII. Delivery.

Every deed to be operative, must be delivered. Hence the form of attestation, "sealed & delivered." 2 Bl. 306. 7. 4 Cruise 28.

From the delivery it takes effect, whatever may be the date. 2 H. 307. 4 Cruise 28, 2 Co. 4. Shep. T. 58. 72. Rol. 401.

If a deed is made & dated during grantor's minority, & sealed & delivered after full age, it will bind him. Shep. T. 72.

And tho a 3. person seals the deed, yet if the party delivers it he is bound: he adopts the sealing & signing. 2 H. 307. 4 Cruise 28. Co. L. 181.

But if delivered before sealing, it is no deed. Sh. pl. 58.

The act of delivery, without words may be effectual. Sh. pl. 58. q 60. 137. Dy 192. Litt § 30. 49. Cro E. 122. 356. Com Dig "Fait" A. 3.

So a delivery may be by words only, without any act of ye grantor. Ex. grantee says (the deed being sealed) "There is my deed, take it." Sh. pl. 58; Cruise 28. 60. 2. 6. n. 6. Com Dig supra.

But if grantee takes it without actual delivery (as from the table where it is laid) & without grantors & ptys direction, or consent, there is no legal delivery, unless it is found that the deed was laid there, with intent to be delivered. i.e. with intent that grantee sh. take it. Sh. pl. 58. n. 3. Dyer. 90. 1 Leon. 140. Com Dig "Fait" A. 3.

As to the mode of proving the delivery see "evidence".

Presumption of delivery, arises from the peaceable poss. of the deed, or of ye land. So in Con. from ye acknowledgment.

A deed may be delivered to the party in person, to any other having authority to receive it - or to any stranger in behalf & for the use of the grantee. Sh. pl. 57. 8. Cruise 28. 9. Dy. 167. Clerk § 157.

A deed cannot be delivered so as to have any effect, more than once - for if the first delivery has any effect (i.e. is not totally void) the second will be void. Sh. pl. 57. 60. Clerk § 184. 4 Cruise 20. 29.

But if ye first delivery is merely void, the second may be effectual. Ex. Deed delivered by feme covert, after her husbands death, delivered again - the second is good. Sh. pl. 60. Clerk § 154. Cowp 201. 4 Cruise 24. 29. 3 Burr. 1805.

So if a deed once good, becomes void as by [illegible]

the deed — a second sealing & delivery will make it good. Shep. T. 65.

But if an infant or one under duress, delivers a deed, & after full age or restoration to liberty delivers it again, the second delivery is void. Shep. T. 60. Perk. § 154. Vin. Ab. "Fait." M. Vide "Fait" N. 4 Cruise 24. For in these cases, the first is only voidable. Shep. T. 57. 3 Co. 35. Vin. "pacem" "Chitty"

Is not the true rule merely, that the 2d delivery is void as a delivery, tho' operating as a confirmation of the deed ab initio?

A delivery may be absolute or conditional. Shep. T. 58. 4 Cruise 29. Co. Lit. 36.a 2 Bl. 307.

When delivered to grantee, or to some other person, to be delivered over, without condition, the delivery is absolute. But if delivered to a stranger to be delivered over on some condition or contingency, the delivery is conditional. 2 Bl. 307. 4 Cruise 29. Co. Lit. 36.a

In the latter case, the writing, till delivered over, is called an "escrow" (scriptum), & it is not the deed of the grantor till that time.

It seems agreed that a writing cannot be delivered, as an escrow to the grantee — if delivered to him, the delivery is absolute — for the grantor is not permitted to aver the his delivery. Shep. T. 59. Cro. Eliz. 884. 9 Co. 137. 4 Bac. 29. Co. Lit. 36.a n. 3. Hob. 246. Noy. Fitz. 251. Roll. Ab. 6 Mod. 218. — Contra Cowp. 235. Moore 7/1. Com. Dig. "Fait" A. 3.

A bond or (in Conn.) a note delivered to arbitrators to be delivered over to the prevailing party, is an escrow. 2 Lu. 10.

If grantor, on delivering a writing to a stranger to

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is delivered over on condition; says "I deliver this as my deed to be delivered over on condition" &c. it takes effect absolutely tho the condition is not performed, the latter words being repugnant to the first. Sheph. 59. Perk. 8. 4 Cruise 36. Co. L. 36a. 9 Co. 137a. Com. Di. Fait. A. 3.

Qu. as to the reasonableness of this rule.

But when properly delivered, as an escrow, it is of no force, till the condition is performed & the delivered over. Sheph. 59. 4 Cruise 29. 30.

When however, on the condition's being performed, the deed is delivered over, it takes effect absolutely. Sheph. 59. 3 Co. 35.

And if on performance of the condition the depositary sh'd refuse to deliver it over, the title w'd still vest by the first delivery, by relation, semble. Sheph. ib. 59. The first delivery being inchoate, & consummated by performance of the cond'n. 3 Co. 35b. 5 Co. 84b. Sed Qu. except in cases of supervening disability, &c. post.

In ordinary cases where there is no disability in the grantor, or impediment to the grant, either at the first or second delivery, the title vests (I conceive) from the time of the second delivery. See 3 Co. 35b. 36a. 5 Co. 84a. Qu. 5 Co. 84b.

But in case of necessity, (as where there is a disability at the second delivery, or impediment at the first) the deed shall take effect, & the title vest, by relation to the first delivery, or not, as the case may require; "ut res magis valeat" &c. Sheph. ib. 72. 3 Co. 35b.

Thus if a feme sole, delivers a writing as an escrow, & then marries, & on performance of the cond'n the deed is

is delivered over, during her coverture, the deed takes effect by relation to the first delivery, it becomes her deed from the first delivery, "ut res magis valeat" &c. Secus, it would fail of effect. 3 Co. 35. b. Gly 423. Shep. T. 72. Cro. E. 447.

So if one delivers a writing as an escrow, & dies, & on performance of the cond.ⁿ the deed is delivered over, it takes effect by relation, for the reason sup.ᵃ 3 Co. 35. b. Cro. E. 447.

And in such cases, if the cond.ⁿ is performed, & the deed not delivered over, it will take effect from y.ᵉ first delivery by relation. 3 Co. 84. b. Shep. T. 59.

The inchoate delivery being consummated by performance of the condition.

Hence also if one delivers a writing as an escrow to be delivered to grantee, on the Grantors death, it takes effect by relation, "ut res magis valeat" &. Belden v. Carter. Sup. C. & C. of E. 1809. 1 Root 160. 2 Id. 383.

So if one of sound mind makes a deed of feoffm.ᵗ & a letter of att.ʸ to a 3.ᵈ person to make livery upon it, & then becomes non compos, the livery will be good by relation to the deed. It is a consummating act. Cro. E. 447. Shep. T. T. 72. n. 1

But if one makes a power of att.ʸ to another to execute a deed of convey.ᶜᵉ after his death, or to make livery where there is no deed of feoffment, ut supra, the execution of the deed in the one case & the livery in the other would be void. Litt. § 66. 1 Bac. "Authority" E. Perk. § 188. Co. L. 52. 9 Rol. 9. Shep. T. 207. (212) For there is no inchoate convey.ᶜᵉ to which the act of the att.ʸ can relate; the power of att.ʸ being a bare authority, not a conveyance.

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But if the application of the doctrine of relation would defeat the deed, when it is first delivered as an Escrow, the title will rest from the second delivery only; "ut res magis valeat" &c Shep. 72.

"Thus if a person disseised makes a lease, & one out of poss^n, & while out of poss^n himself delivers it to a stranger to be delivered to the lessee on the land, it will take effect only from the second delivery - for if the doctrine of relation were applied to it, it w^d be void. Cro E. 447. 3 Co 35^b. Co L. 48^b. 3 Bulst. 215. Shep. 59.

This rule, however, cannot operate so as to defeat the privilege of a person, who is under a legal disability at the time of the first delivery. Thus if an infant or a feme covert makes a deed, & delivers it to a stranger, to be delivered to the grantee, & it is delivered over, after coverture, or full age, the deed does not bind. 3 Co 35^b. 36^a. Cro E. 165. Cro J. 617.

A deed never takes effect by relation, so as to effect "collateral acts." Shep. 73. 3 Co 36^a. 2 Roll 410. Park § 125. i.e. it operates retroactively, I conceive, when it does not so, only to the purpose of vesting the right or title "ut res" &c. (5 pm.)

Thus if a bond is delivered as an Escrow: & delivering over to obligee, under circumstances, which give it effect by relation, a release between the first & second delivery, does not discharge it. 3 Co 36^a. Shep. 73. For it has not become the obligors deed, at the time of the release.

Nor, I conceive can this retroactive operation make one a trespasser by relation. Ex. If grantor remains in poss^n between the first & second delivery he cannot, surely, after

after the second delivery be liable for this pupor. A fiction of Law never works an injury or makes that tortious wh. was lawful. 3 Co 36 a. Co L. 100 a. 2 Rol. 502. 3 Co 29 b. Com Di. "Confirmation" D. 5. Heel. 7.

A Deed delivered to A for the use of B. & to be delivered over to B. is deemed good, until B. dissents. 2 Root 26.

If a deed is delivered to a stranger to be delivered over, & the grantee on tender refuses to accept it, he can never afterwards claim it. The first delivery has lost its force, & the grantor may plead non est factum to it. 5 Co 119 b. & Dub. 3 Co 26 b. Doct. pl. 260. 1. Cro E. 54. Sheph. 60.

VIIIth. *Attestation &c.* The last requisite to a deed is the attestation of it, i.e. the execution of it, in the presence of witnesses 2 Bl. 307. 4 Cruise 31.

This however is not, at C. L. an essential part of the deed, but mere evidence of its authenticity. Idem.

Formerly the witnesses to a deed did not usually subscribe their names to it, tho now the practice is otherwise, & has been since the reign of Hen. 8. (2 Bl. 307. 8. Co L. 7. 78.) but it is not necessary in Eng. even now. 2 Bl. 307. 8.

In Con. all grants & mortgages of houses & lands must be attested by two witnesses, who must subscribe their names or marks. Stat. C. 653. 1 Sw. 306.

In Con. certain requisites, unknown to C. L. are prescribed by Stat. viz.

IX. That all grants &c. & mortgages of houses & lands shall be acknowledged before an assistant commissioner or justice of the peace, else they are not complete. Stat 653. 1 Sw. 307.

Note. The Officer exercising the power of a justice of peace was

was before y^e year 1698 called a "commissioner." St. 653. note.

If grantor after executing a deed, refuses on request to acknowledge it, the grantee may "enter caution," with the recorder of the Town, & this secures the interest to grantee till a "legal trial" had. And the judg^t. (if in favor of the grantee,) delivered to the recorder, will authorize him to record the grant. Stat. C. 653.

And copy of the grant, authenticated as the Stat. requires (i.e. by the register & an assistant or justice of the peace, & a select man), shall be a sufficient assurance of the title. Stat. 653. See 1 Sw. 307.

Qu. what sort of "legal trial," is ~~required~~ intended by the Stat.?

X. Recording. By our Stat. no deed of sale, or mortgage of houses or lands, is effectual in law, except to the grantor &c. & his heirs, unless recorded at length in y^e records of the Town. Stat. 653.4. 1 Sw. 307.

The Town Clerk on receipt of a deed, is to note the day – the record to bear same date. (St. 654.) on penalty of 17$. ( )

The object of the Stat. is to give notice to third persons, & reduce titles to certainty. 1 Sw. 307.8.

The title as to 3^d. persons, is in general complete & effectual, from the date of the record. Kirb. 72. 1 Root. 61.

So that as between different purchasers of y^e same subject the deed first rec^d. & noted by the Clerk will prima facie hold the title, to y^e exclusion of even a prior deed.

But this rule does not hold, if the prior grantee has used due diligence to procure his deed recorded i.e. if he has lodged it with y^e Clk. within a reasonable time. 1 Sw. 303. 1 Root. 300. 2. 1627. 1 M. 380.

For the grantee is always allowed a reasonable time for recording, even at Law. 1 Sw. 308.

But if prior grantee has delayed an unreasonable time, a subsequent purchaser, or attaching creditor first recording will hold vs him. 1 Sw. 308. 1 Root 388. 2 D. 287.

What is a reasonable time is not settled by any definite rule. It must be determined by the circumstances of the case. 1 Sw. 308. 1 Root 389.

And if a prior grantee having lodged his deed in season, prevents it from being recorded at length, the subsequent recording of it will not have relation to the time of lodging it, as vs an intermediate purchaser whose deed is first recorded. 1 Root 81

Suppose the prior deed, it being seasonably lodged to be recorded, before the subseqt one is lodged, tho after the lapse of a reasonable time, who will hold? The prior grantee, I conceive, at Law & in Eqty.

Suppose the prior deed, it being seasonably lodged, to be first recorded, tho after the lapse of a reasonable time, & after the subseqt one is lodged & noted. The subseqt purchaser, I apprehend, will hold even at Law, according to the analogy of other cases decided here, as he is entitled to the benefit of relation & the other not, semb. Root 81. 61. Qu.

But if the prior deed, being lodged for record, is prevented from being recorded, by the subseqt purchaser, or by the grantor, it will when afterwards recorded, hold vs the intermediate purchaser, tho his deed is first recorded. 1 Root 81. 2. 300. 2 D. 239. Willetts vs Overton S. Ct. So if the record is delayed by the negligence of the Clerk. 1 Root 300.

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And it is said to have been determined by our Courts, that a Subseq. deed first recorded, shall hold to the exclusion of a prior one (the recording of which has been unreasonably delayed by the prior grantee) tho' subs. purchaser has actual notice of the first deed: vid. 1 Root 61. 81. But vid. 1 Sw. 309.

And such is the rule adopted at Law in Eng. in the construction of the Registered Acts. 1 Fonbl. 23. 1 Ves 66. Coop 712.

But it is settled in Eng. that if the party first registering knew of the prior unregistered deed, at the time of purchasing, the prior grantee shall hold in Equity. 1 Fonbl. 23. 1 Ves 66. Coop 712. 1 Eq. C. ab. 358. 2 Atk 278. 3 K 846. Amb. 346.

The subsequent purchaser is, in this case, considered as a trustee for the former.

The rule must be the same here, I conclude. Qu. does the delay of the prior grantee, make any difference in Eq.

If Town Clk. having received a Deed for record, delivers it back without recording, even at the request of both parties - he is liable to any party injured by the act, as Creditor of grantee, who have attached it, or a purchaser under him. 2 Root. 85.

So it is his duty to keep the deed, till recorded or file. If he conceals it, he is liable to any one who is injured by the concealment, semble Eq. to subseq. purchasers from the grantee.

How destroyed or avoided. If an instrument wants any of the requisites, essential to a deed it is void as a deed. (2 Ch 308) i.e. it is no deed.

(4)

Title by Deed.

A Deed may also be destroyed (made void) by matter ex post facto - Ex

1. By rasure, interlineation, or other alteration in a material part. 2 Bl. 308. 11 Co 27.

But these, if made before delivery, do not invalidate the deed - If a memorandum is made of them, at the time of execution. 2 Bl. 308. 4 Cruise 26. Shep 55.

Seems, they destroy the deed in Eng[d] 2 Bl. 308. not so here.

An alteration by grantee after delivery destroys the deed, whether the alteration is in a material or immaterial part. 11 Co 27[a]. 2 Rol. Ab. 24. pl. 2 34

But an alteration by a Stranger does not destroy the deed, unless it is in a part material. 11 Co 27[a]. 2 Rol Ab. 24. 2 Bulstr. 247 Cro E. 626.

In these cases (i.e. where the deed is destroyed) non est factum may be pleaded to it. 5 Co. 119. 11 Co. 27[a] Cro E. 620.

And if a Stranger thus destroys a Deed, he is liable in case to the grantee. Cro E. 621.

2[d]. By breaking off or destroying y[e] seal. 2 Bl. 305. 5 Co 23.

3[d]. By delivering up the deed, to be cancelled. 2 Bl. 305. q.

4[th]. By the subsequent disagreement of those whose concurrence is necessary. Ex. of Husd. to his wife's purchase - of infant grantee or grantee - Ab. 2 Bl. 309. Shep Ab 68. [70]

5[th]. By the sentence or decree of a Ct. of Justice &c. Deed claimed by fraud, force &c. set aside in Chy. 2 Bl. Rep. 348. 2 Ves. C. 143. 163.

For the different kinds of Deeds &c., 2 Bl. Com. 343.

Construction of Deeds.

Deeds are to be construed as near the apparent intention of the parties, as the rules of Law will permit. 4 Cruise 416. Co. L. 36.a Plow: 154. 160. 3 Atk. 136.

False grammar never vitiates a deed. 4 Cruise 416. Sh. pl. 87. Plow: 154. 70. 134. 9 Co 48.a

The construction should be upon the whole deed, not on any part only; and so made, if possible, that any part may take effect. 4 Cruise 416. Sh. pl. 87. Plow: 160. 1. Litt. § 283.

The words are to be taken most strongly vs. the grantor, or party whose words they are, (4 Cruise 416.) & most favorably to the grantee. Ex. Land granted to A. without mentioning the quantity of interest. A takes for his own life. Sh. pl. 87. 8.

If two clauses are repugnant, the first is to operate, & the latter to be rejected, unless there is special reason to the contrary. Shep. 88. Hard. 94. Noy 30. Co L. 299.a 4 Cruise 418.

Words of general release, when standing alone, are to be construed generally. Secus, if preceded by a particular recital. They are then restrained by ye recital. 4 Cruise 417. Bac. ab. release K. Hob. 74. 1 Sid. 141. 1 Bro. C. 390. 3 Mod. 277. 2 Lev. 269. Ex.

If the words will bear two constructions, one agreeable to law & justice & the other not, the former is to be preferred. 4 Cruise 417. Co L. 42.a 183.a

Words which are repugnant to the general tenor of the deed & the evident intention, are to be rejected. 4 Cruise 418. 2 Atk. 135. 5 Bro. P.C. 351.

When any subject is granted, all the means necessary to the attainment of it pass with it. Ex. A grantor pieces

&c

of ground, in the middle of his field to B. This impliedly gives B. a right of way to it. 2 Bl. 36. Finch 63. Co. L. 56. Shep. 89.

So if A grants trees growing on his land, grantee has the right of entering on the land to cut & carry them away. Shep. 89. 11 Co. 52 a. "Trespass" ...

So if one grants a mine in his land grantee has a right to dig it. Shep. 89.

So if one grants fish in his pond grantee may go upon the bank to take them. Shep. 89. Finch L. 63.

Hence also the grant of the principal, or subject, generally carries with it the incident, or accessary, without the words "with the appurtenances". Ex. by a grant of the reversion, the rent passes &c. Shep. 89. Litt. § 522. 229. 4 Co. 86. 7. 2 Bl. 176. 174. Co. L. 143. "Estates in possn" &c.

So by the grant of a house, the ways belonging to it, will pass. Shep. 89.

By the grant of a mill, the water, necessary to the use of it will pass. Shep. 89.

A Deed drawn in a form in which by Law it cannot take effect, may operate as a deed in another form for the purpose of effecting the intention ut res magis valeat. &c. Shep. [82] 79. 2 Co. 35. Cowp. 600. 2 Wils. 75. Co. L. 301.

Thus a deed in the form of a grant between joint tenants may operate as a release. If made by the particular tenant to the remainder man, as a surrender. If made without valuable consid. to a kinsman, as a covenant to stand seised. &c. &c. 4 Cruise 420. Shep. 82. Co. L. 301. Hob. 149. [illegible] 137. 3 Atk. 272. [illegible]

So also a deed of grant of a thing in which one of them has

has the whole interest, is in legal effect, his sole deed. — Shep. 81.2. Cook § 66. 4 T.R. 472. 1 H.B. 614. 4 Cruise 429.

If the terms of a deed are so uncertain, that y. intention cannot be discovered, it has no effect. Eg. grant to "A or B." to "one of the Children of J.S." he having several — v. 4 Cruise 425. Hob 313. 2 And.

When a deed, being void in part, is so, of course in toto & when not. See Shep. 70.1. 11 Co. 27 b. Dy. 27

Rules: If a deed contains several covenants, some of which are lawful, & others not, y. latter are void, y. former good. 11 Co 27 b. Shep. 70. — 2dly. if the others are made void by Stat 2 Wils 351. 2 Bob. 14. 1 Bac. Ab. 199. 200. "Contracts."

So if there are several distinct clauses, some of which are truly read to y. party, & y. others not, the deed is good as to y. former, & void as to y. latter. 11 Co 27 b. Shep 70.

But these rules cannot strictly. I conceive if y. lawful & unlawful covenants in y. one case or the clauses, truly read & not truly read in the other, are connected & dependant on each other. Shep 70.

If two are jointly bound in a bond, & y. seal of one is broken off, the whole becomes void, as to both. 11 Co 28 b, Rol R. 40. 2 Bulst. 248. Dod. pl. 259. 262. Cro E. 576. 546. — seems if several bound.

If a deed containg. several distinct & absolute covenants, is altered in one of them, y. whole deed becomes void. Shep. 71. 11 Co 28 b. 2 Rol. 30.

If two distinct obligations are written on one paper, & one of y.m only is read truly, & y. paper is seal.d & delivered, it is y. deed of y. party, as to y. one & not as to y. other. 11 Co 27 b & Rol 28. 2 Co 3 b. 9 b. Shep 70.

But if a deed is void, as to part of an entire sum, it is void generally as to the whole — eg. bond for 20 £ read as for 20 s. 11 Co 27 b. Sh. p. 70.

Viz.

REEVE'S
AND GOULD'S
LECTURES.

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